136-633

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~[illegible]~~ 118

THE CHICAGO AND ALTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY H. WATERMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 4, 1886.

SUPREME COURT OF THE UNITED STATES.

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No. 392.

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vs.

HENRY H. WATERMAN.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Henry H. Waterman and The Chicago & Alton Railroad Company, a manifest error has happened, to the great damage of the said the Chicago and Alton Railroad Company, as as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, A. D. 1886, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27th day of March, A. D. 1886.

[Seal U. S. Circuit Court, West. Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

2 The return of within writ appears by the schedule hereto annexed.

The return of the judge of the circuit court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office, in the city of Madison, this 27th day of March, A. D. 1886.

F. M. STEWART, *Clerk.*

[Endorsed:] Supreme Court of the United States. Henry H. Waterman *vs.* The Chicago and Alton Railroad Company. Writ of error. Filed March 27th, 1886. F. M. Stewart, clerk.

3 UNITED STATES OF AMERICA, }
Western District of Wisconsin, } *ss:*

At a special term of the circuit court of the United States of merica for the western district of Wisconsin, begun and held ac- ding to law, at the city of Madison, in said district, on the first sday (being the 1st day) of December, A. D. 1885.

sent and presiding: The Honorable Romanzo Bunn, judge.

ng other the following proceedings were had, to wit:

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HENRY H. WATERMAN, Plaintiff,
vs.
THE CHICAGO AND ALTON RAILROAD COMPANY, Defendant. } At Law.

Be it remembered that heretofore, to wit, on the 14th day of April, A. D. 1885, came the above-named defendant, by its attorneys, Fethers, Jeffis & Smith, and filed in this court a transcript of the record and proceedings in this cause in the circuit court of the State of Wisconsin for Rock county, and moved that the cause be docketed and be proceeded in as provided in the act of Congress of March 3d, 1875, in relation to the removal of cases from the State courts; whereupon the cause is docketed, which said record is as follows, to wit:

STATE OF WISCONSIN:

Circuit Court, Rock County.

4 HENRY H. WATERMAN, Plaintiff,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

STATE OF WISCONSIN, } ss:
Rock County, }

Henry H. Waterman, being duly sworn, says that he is the plaintiff in the above-entitled action.

That the summons in said action has been issued and said action is now pending; that plaintiff now resides, and for more than two yeors last past has resided, in said county and State; that the above-named defendant is a foreign corporation, being a railway corporation organized and existing under and by virtue of the laws of the State of Illinois; that as such railway corporation the defendant owns and operates a line of railway lying partly within the city of Chicago, in said State of Illinois, and there connects with two certain lines of railway track owned by the Pittsburgh, Cincinnati & St. Louis Railway Company, and which extends southerly from Michigan avenue through Brighton Park and across Archer avenue, in said city, and thence to or near to the Union Stock Yards, which are located within said city or near the southerly boundary thereof.

That in so operating its said railway the defendant owns and uses a large number of locomotive engines and cars and employ*ing* a large number of locomotive engineers, firemen, switch tenders, and other agents and servants; that the Chicago, Milwaukee, and
5 St. Paul Railway Company is also a railway corporation organized and existing under and by virtue of the laws of said State of Wisconsin, and owns and operates a certain line of railw extending from the city of Janesville, in said State of Wisconsin said city of Chicago, and there connecting with said lines of rail track of said Pittsburgh, Cincinnati and St. Louis Railway Com

That at all times herein mentioned said Chicago, Milwaul

St. Paul Railroad Company was a common carrier of passengers and of live stock and other property over its railway and over such connecting lines of railway tracks in said city of Chicago; that on the morning of December 24, 1882, this *defendant* was lawfully riding as a passenger in one of the cars of a stock train, so called, of said Chicago, Milwaukee and St. Paul Railway Company which was en route to said Union Stock Yards by way of said company's said line of railway and such connecting line of railway of said Pittsburgh, Cincinnati & St. Louis Railway Company and certain railway tracks of the Union Stock Yards Company therewith connecting

That when said train upon which deponent was so riding was proceeding southerly towards its destination aforesaid, and when it had arrived at a point south of and near to said Archer avenue, upon one of said tracks of said Pittsburgh, Cincinnati & St. Louis Railway Company, the said defendant, by it agents and servants, wrongfully, recklessly, and negligently ran and propelled one of its cars,
6 loaded with coal and having one of its engines thereto attached, upon and against said car in which deponent was so riding, thereby breaking and partially overturning the same, and driving and forcing some portion thereof or the contents thereof upon and against deponent's left side and back, whereby deponent was greatly bruised and injured; that by reason of said injuries caused by the wrongful, reckless, and negligent acts and conduct of the defendant as aforesaid deponent has become partially paralyzed, and his spinal cord has become diseased, and he has ever since receiving such injuries suffered great bodily pain and great mental pain, anxiety, and vexation; and deponent, upon information and belief, alleges that he will until his life ends continue to suffer great bodily pain and great mental pain, vexation, and anxiety by reason of such injuries.

And this deponent further sayeth that he is and ever since receiving such injuries has been and, upon information and belief, alleges that until his life's end he will continue to be totally disabled and unable to do any work or attend to business; that he has by reason of such injuries incurred great expense for medical attendance and care of himself.

And deponent further saith that he has by reason of such injuries received by and through the defendant's wrongful, reckless, and negligent acts as aforesaid suffered and sustained damages in the sum of $50,000.00, and further saith that he claims, and in his complaint in said action has claimed, to recover of and from the
7 said defendant the said sum of $50,000.00 damages, together with the costs of this action.

HENRY H. WATERMAN.

Subscribed and sworn to before me this 8th day of August, A. D. 1884.

[SEAL.]

ERASTUS P. CLARKE,
Notary Public, Wis.

Circuit Court, Rock County.

HENRY H. WATERMAN, Plaintiff,

vs.

THE CHICAGO & ALTON [RAIL]ROAD COMPANY, Defendant.

The above-named plaintiff having applied or being about to apply for a writ of attachment against the property of the above-named defendant, Chicago and Alton Railroad Company, we, E. A. Holmes, of the village of Milton, in the State of Wisconsin, and F. D. Griggs, of the town of Lima, county of Rock, in said State, do undertake, pursuant to the statute in such case made and provided, in the sum of one thousand dollars, that if the said defendant recover judgment in this action the above-named plaintiff will pay all costs that may be awarded to the said defendant and all damages which the said defendant may sustain by reason of the writ of attachment, not exceeding the sum above named.

Dated August 20, A. D. 1884.

E. A. HOLMES.
F. D. GRIGGS.

8 STATE OF WISCONSIN, } ss:
Rock County, }

E. A. Holmes, being duly sworn, says that he is one of the subscribers to the foregoing undertaking; that he is a resident and freeholder within this State and is worth the sum of one hundred dollars in property within this State and exclusive of all property exempt from execution.

E. A. HOLMES.

Subscribed & sworn to before me this 20th day of August, 1884.

ERASTUS P. CLARKE,
Notary Public, Wis.

STATE OF WISCONSIN, } ss:
Rock County, }

F. D. Griggs, being duly sworn, says that he is one of the subscribers to the foregoing bond; that he is a resident and freeholder within this State and is worth the sum of ten hundred dollars in property within this State over and above all his debts and exclusive of all property exempt from execution.

T. D. GRIGGS.

Subscribed and sworn to before me this 20th day of August, D. 1884.

ERASTUS D. CLARKE,
Notary Public,

STATE OF WISCONSIN, } ss:
Rock County, }

Be it remembered that on this 20th day of August, A. D. 1884, personally appeared before me the above-named E. A. Holmes & T. B. Griggs, to me known to be the persons of such names
9 described in and who signed the foregoing undertaking, and acknowledged that they executed the above undertaking as their own free will for the purposes and uses therein mentioned.

[SEAL.] ERASTUS P. CLARKE,
Notary Public for Wis.

STATE OF WISCONSIN:

Circuit Court for Rock County.

HENRY H. WATERMAN, Plaintiff,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Defendant.

The State of Wisconsin to the sheriff of the county of Milwaukee, Greeting:

You are hereby commanded to attach and safely keep all the property of The Chicago and Alton Railroad Company, the defendant in the above-entitled action, within your county, or so much thereof as may be sufficient to satisfy the demand of Henry H. Waterman, the plaintiff in the above-entitled action, as specified in the affidavit of said plaintiff hereto annexed, together with the costs and expenses to satisfy any judgment that may be recovered by the said plaintiff against the said defendant, and of this writ make due return to said court according to law.

Witness the Honorable John R. Bennett, presiding judge of
10 said circuit court for the county of Rock, in county, this 27th day of August, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] A. W. BALDWIN, *Clerk.*

WM. RUGER,
Plaintiff's Attorney, Janesville, Wisconsin.

MILWAUKEE COUNTY, ss:

I certify that on the 28th day of August, 1884, by virtue of the within writ of attachment, I seized, as the property of the within-named defendant, The Chicago & Alton Railroad Company, freight cars numbered 4792 & 5684, and on the 30th day of August refrigerator cars numbered 1700, 1706, & 1708, and I had said property so attached in my possession until the 1st day of September, 1884, when, by direction of the plaintiff's attorney, I released all of said property and discontinued further proceedings herein. I further certify *and* that after diligent search and enquiry I could not find any officer or agent of said defendant in my county.

JOHN BURLTON, *Sheriff,*
By JOHN W. DUNLAP,
Under Sheriff.

expenses, $25.00.

11 STATE OF WISCONSIN:

Circuit Court for Rock County.

HENRY H. WATERMAN, Plaintiff,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Defendant.

The above-named defendant having entered its appearance in this action and requested the release of all its property attached therein by the sheriff of Milwaukee county, it is stipulated on the part of the plaintiff that sheriff may release and deliver said property to the defendant; that it will — said sheriff his costs on such attachment and *and* make no claim for damages by reason thereof in any event.

Dated Sept. 1st, 1884.

WM. RUGER,
Att'y for Plaintiff.
C. BECKWITH,
General Solicitor for The Chicago & Alton R. R. Co., Defendant.

STATE OF WISCONSIN:

Circuit Court for Rock County.

HENRY H. WATERMAN, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

The State of Wisconsin to the defendant:

12 You are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served on you.

Dated August 7, 1884.

WM. RUGER,
Plaintiff's Attorney, P. O. Address, Janesville, Rock Co., Wis.

STATE OF WISCONSIN, *Rock County:*

I, R. B. Harper, sheriff of the county of Rock, do hereby certify that after due diligence to that end used I have been unable to find the within-named defendant, The Chicago & Alton Railroad Company or any agent thereof within said county of Rock.

Dated August 22, A. D. 1884.

R. B. HARPER, *She*

13 STATE OF WISCONSIN:

Circuit Court, Rock County.

HENRY H. WATERMAN, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

The plaintiff complains of the defendant, and alleges that the plaintiff now resides and for more than two years last past has resided at the village of Milton, in the county of Rock and State of Wisconsin; that the defendant is a railway corporation organized and existing under and by virtue of the laws of the State of Illinois, and as such owns and operates a line or lines of railway which are in part situate within the limits of the city of Chicago, in said State of Illinois, and which connect with the lines of railway track of the Pittsburgh, Cincinnati & St. Louis Railway Company and Union Stock Yards Company hereinafter mentioned; that the defendant in so operating its said lines of railway uses a large number of locomotive engines and cars and employs a large number of agents and servants; that the Chicago, Milwaukee and St. Paul R. R. Co. is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and owns and operates a certain line of railway extending from the city of Janesville, in said State of Wisconsin, to said city of Chicago, and there connecting with said lines of railway track of the Pittsburgh, Cincinnati &
St. Louis R. R. Co. and Union Stock Yards Co. hereinafter
14 mentioned; that at all the times herein mentioned said Chicago, Milwaukee and St. Paul R. R. Co. was a common carrier of passengers and of live stock and other property over the said railway and such connecting lines of railway track in said city of Chicago; that the Pittsburgh, Cincinnati & St. Louis R. R. Co. before mentioned is also a railway corporation and owns two certain lines of railway track extending from Michigan avenue, in said city of Chicago, southerly through Brighton Park and across Archer avenue, in said city, and thence to or near to the Union Stock Yards hereinafter mentioned; that said Union Stock Yards Company is a corporation organized and existing under the laws of said State of Illinois and owns and manages certain stock yards for the reception and sale of live stock at Chicago aforesaid, and also owns two certain lines of railway track extending from its said stock yards northerly along and adjacent to said two lines of railway track of said Pittsburgh, Cincinnati & St. Louis Railway Company aforementioned; that a map is hereto attached as a part hereof, illustrating and showing the location and relative positions of these portions of said lines of railway track of said Pittsburgh, Cincinnati & St. Louis Railway Company and said Union Stock Yards Company which immediately south of said Archer avenue, together with their ...es, connecting tracks, and appurtenances; that in the man... of their said railway tracks said Union Stock Yards Com-

pany and said Pittsburgh, Cincinnati & St. Louis Rail-
15 way Company each employ — and other agents and servants.

And this plaintiff, upon information and belief, further alleges that in pursuance of some contract or license, the terms of which are to plaintiff unknown, the defendant and the Chicago, Milwaukee and St. Paul Railway Company are permitted to and do severally use each of the several lines of railway track, switches, and connecting track represented on said map, and in so using the same do severally avail — of the services of and employ and use as their own servants such switch-tenders and other servants and agents of said Union Stock Yards Company and said Pittsburgh, Cincinnati & St. Louis Railway Company having charge of the said railway tracks, switches, connecting tracks, and appurtenances represented on said map.

That on the morning of December 29, 1882, this plaintiff was lawfully riding as a passenger in the front car of a stock train of said Chicago, Milwaukee and St. Paul Railway Company, consisting of one engine and eighteen stock or freight cars, and which was en route to said stock yards by way of said last-mentioned company's said line of railway and the connecting lines of railway aforementioned; that plaintiff was part owner of and had in his charge two car-loads of live stock, which two cars were part of said train and one of which was loaded with hogs and sheep and was located at the front of said train, next to engine propelling the same, and in caring for the said stock it was necessary that plaintiff should and he did ride in said cars containing his said hogs and sheep.

16 That as said train was proceeding southerly towards such stock yard, and after it had crossed or partly crossed said Archer avenue upon the most easterly of said two tracks of said Pittsburgh, Cincinnati and St. Louis Railway Company, it was compelled to and did come to a stop by reason of the fact that an engine of the defendant, with one car loaded with coal, thereto attached, was at the same time standing or moving northerly upon the same track south of and near to switch "B" of said track, as represented by said map; and this plaintiff, upon information and belief, alleges that defendant's said engine and car were in charge of two of its servants, one acting in the capacity of engineer and the other in that of fireman and switchman.

That for the purpose of allowing defendant's said engine and car to be by its servants in charge thereof moved out of the way so that the train on which plaintiff was so riding might pass on towards its destination one of the switch-tenders having charge of the switches shown on said map or some of them so placed the two switches on said map, marked "A" & "B," that defendant's said engine and car could by means of the connecting track between said two switches on said map, marked cross-over, pass northerly to and upon the most westerly of said two tracks of said Pittsburgh, Cincinnati and St. Louis Railway Company, and when said switches had been placed defendant's servants in charge of its said engine and car move the same northerly over said cross-over track

17 upon the most westerly of said tracks of said Pittsburg

cinnati & St. Louis Railway Company and then came to a stop stop upon or near to said switch so marked "A."

That thereupon said switch-tender who had so placed said switches replaced said switch "B" and signalled to the engineer of the train upon which the plaintiff was so riding to move forward with his said train, which he thereupon did, and had proceeded therewith southerly until said car in which plaintiff was so riding was at or near to the point of intersection of the westerly rail of said track upon which plaintiff's train was so moving with the easterly rail of said cross-over track, when defendant's servants in charge of its said engine and car suddenly, wrongfully, recklessly, and negligently started defendant's said engine and car and rapidly run the same forward in a southerly direction on said cross-over track, and drove and propelled with great speed, force, and violence the said coal car against said car in which plaintiff was so riding, and thereby forced and drove one portion thereof, or of the contents thereof, against and upon plaintiff's left side and back, whereby he was greatly bruised and injured.

That defendant's servants in charge of said engine and car so started the same without having received any signal so to do, and so run the same with great speed, force, and violence against said car in which plaintiff was riding, notwithstanding the fact that they were warned and signalled to stop, and in so doing defend-
18 ant's said servants and defendant were guilty of very gross negligence.

That by reason of the injuries received by plaintiff as aforesaid plaintiff has ever since been, now is, and upon information and belief alleges that he will until his life's end continue to be, permanently incapacitated and wholly unable to perform any labor or attend to any business.

That the injuries so received by plaintiff have caused serious inflam-ation and disease of plaintiffs spinal cord, and he has become partially paralyzed, and upon information and belief he alleges that said paralysis and disabled condition of his spinal cord are progressive and increasive.

That by reason of such injuries plaintiff has —, upon information and belief he alleges that he will until his life's end continue to suffer, great bodily pain and great mental pain, vexation, and anxiety.

That by reason thereof he has and will continue to suffer great pecuniary damage and loss by reason of his incapacity to work and attend to business, and by reason of expense incurred for medical attendance and care; and plaintiff has, by reason of such injuries received by and through defendant's gross negligence as aforesaid, suffered damage in the sum of $50,000.00.

Wherefore plaintiff demands judgment against the said defendant for said sum of $50,000.00 as damages, and for costs of this action.

WILLIAM RUGER,
Att'y for Plaintiff.

19 STATE OF WISCONSIN, *Rock County,* } ss:

Henry H. Waterman, being duly sworn, says that he is the plaintiff in the above & foregoing entitled action; that he has read the foregoing complaint therein and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

HENRY H. WATERMAN.

Subscribed and sworn to before me this 8th day of August, A. D. 1884.

ERASTUS P. CLARKE,
Notary Public, Wis.

(Here follows map marked p. 19.)

STATE OF WISCONSIN:

In Circuit Court for Rock County.

HENRY H. WATERMAN, Plaintiff,
vs.
THE CHICAGO AND ALTON RAILROAD COMPANY, Defendant.

The defendant, by Winans, Fethers & Jeffries, its attorneys, in answer to the complaint of the plaintiff herein, admits that the plaintiff now resides and for more than two years last past has resided at the village of Milton, in the said county of Rock and State of Wisconsin, as alleged in said complaint.

The defendant, further answering, admits that it is a railway corporation duly organized and operating the lines of railway as in said complaint alleged.

20 The defendant further admits that in so operating its said lines of railway it uses a large number of locomotive engines and cars and employs a large number of agents and servants.

The defendant, further answering, admits that the Chicago, Milwaukee and St. Paul R. R. Co. is a corporation organized under and by virtue of the laws of the State of Wisconsin, and that it owns and operates a certain line of railway, as alleged in said complaint.

That the said Chicago, Milwaukee and St. Paul R. R. Co. was a common carrier of passengers, live stock, and other property, as in said complaint alleged.

The defendant, further answering upon information and belief, admits that the Pittsburgh, Cincinnati and St. Louis R. R. Co. is a railway corporation and owns the lines of railway, as in said complaint alleged.

The defendant further admits that the Union Stock Yards Company is a corporation organized and existing under the laws of the State of Illinois and owns and manages certain stock yards

reception, care, and sale of live stock at Chicago, and also that it owns two certain lines of railway track extending from its said stock yards northerly.

That as to the correctness of the map attached to said complaint, illustrating and showing the locations and relative positions of the lines of railway track of said Pittsburgh, Cincinnati & St. Louis Railway Company and said Union Stock Yards Company, which lies immediately south of Archer avenue, together with their switches, connecting tracks, and appurtenances, the defendant has no knowledge or information sufficient to form a belief,
21 and therefore denies the same or that it is correct.

The defendant, further answering, admits that in the management of their railway tracks said Union Stock Yards Company and *said Union Stock Yards Company and* said Pittsburgh, Cincinnati & St. Louis Railway Company each employ switch-tenders and other agents and servants.

The defendant, further answering, says that it has no knowledge, information, or belief, except as it is informed by said complaint, that plaintiff sustained injuries at or about the time or in the manner in said complaint mentioned, and therefore denies the same.

And the defendant, further answering, and as a defence to said complaint, denies each and every allegation therein contained except as hereinbefore expressly admitted.

Wherefore the defendant demands judgment that the complaint in this action be dismissed, and for its costs and disbursements.

WINANS, FETHERS & JEFFRIES,
Defendant's Attorneys.

STATE OF ILLINOIS, *Cook County:*

C. Beckwith, being duly sworn, says that he is the general solicitor of the Chicago and Alton Railroad Company; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he be-
22 lieves it to be true. The grounds of his belief are information communicated to him by agents and employees of said corporation.

CORYDEN BECKWITH.

Subscribed and sworn to before me this 22 day of October, 1884.
WILLIAM COLEBROOK,
Notary Public, Cook County, Ill.

THE STATE OF WISCONSIN:

Circuit Court, Rock County.

HENRY H. WATERMAN
vs.
THE CHICAGO & ALTON RAILROAD COMPANY

To the Honorable John R. Bennett, the judge of said court:

The petition of the defendant above named, by C. Beckwith, its general solicitor and one of its general officers, respectfully shows

that it is a citizen of the State of Illinois, and that the plaintiff is a citizen of the county of Rock, in the State of Wisconsin; that the above-entitled action was commenced by the service of summons in said county on the 1st day of September, A. D. 1884, and that the action is brought to recover damages for alleged personal injuries claimed to have been sustained by said plaintiff through the negligence of the defendant's servants; that your petitioner has
23 reason to believe and does believe that from prejudice or local influence it will not be able to obtain justice in said circuit court for Rock county; that the matters in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and that the November term, A. D. 1884, of said court is the first term of said court at which said cause could be tried, and that it has not yet been tried; and your petitioner herewith presents a bond, with John Griffith, a good and sufficient surity, for its entering at the next term of the circuit court of the United States for the western district of Wisconsin, on the first day of its next session, a copy of the record in the above-entitled cause, copies of said process against petitioner, and of all pleadings, deposition, testimony, and other proceedings in the cause, and for the payment of all costs which may be awarded if said circuit court shall hold that the cause was wrongfully removed thereto, and also for their appearing and entering special bail in said suit if special bail was originally required therein; and your petitioner hereby offers to furnish such additional surity as this honorable court shall require.

That your petitioner is a corporation duly organized under the laws of the State of Illinois.

Wherefore your petitioner prays this court to accept said petition and bond, and to proceed no further in this action pursuant to the provisions of the acts of Congress in that behalf.

THE CHICAGO & ALTON RAILROAD COMPANY,
By C. BECKWITH, *Its General Solicitor.*

Subscribed and sworn to before me this 21st day of October, A. D. 1884.

[SEAL.] WM. COLEBROOK,
Notary Public.

24 Know all men by these presents that we, The Chicago & Alton Railroad Company, by its president, and John Griffiths, are held and firmly bound unto Henry H. Waterman in the sum of five hundred —, to be paid to the said Henry H. Waterman, executors, administrators, or assignees; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the 29th day of October, 1884.

Whereas the above-bounden Chicago & Alton Railroad Company has petitioned the circuit court of Rock county, State of Wisconsin, for the removal of a cause therein pending, wherein Henry H. Waterman is plaintiff and said Chicago and Alton Railroad Company is

defendant, to the circuit court of the United States for the western district of Wisconsin, pursuant to the provisions of the acts of Congress in that behalf:

Now, therefore, the condition of the above obligation is such that if the above-bounden Chicago & Alton Railroad Company shall enter in such circuit court on the first day of its next session a copy of the record in such suit, copies of the process against petitioner, and of all the pleadings, depositions, testimony, and other proceedings in the cause, and shall pay all costs that may be awarded by said *said* circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in such suit if special bail
25 was originally required therein, then this obligation shall be null and void; otherwise of force.

THE CHICAGO & ALTON R. R. CO.,
By T. B. BLACKSTONE, *Its President.*
Attest: C. H. FOSTER, *Secretary.* [SEAL.]
JOHN GRIFFIFTHS. [SEAL.]

In presence of—
W. J. SCRAFFORD,
ARTHUR H. SMITH,
As to C. & A. R'd Co.
OGDEN H. FETHERS,
LEROY F. HOLLOWAY,
As to John Griffiths.

STATE OF WISCONSIN, } ss:
Rock County, }

I, John Griffiths, of city of Janesville, county of Rock, and State of Wisconsin, the surity named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Wisconsin and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution.

JOHN GRIFFITHS.

Subscribed and sworn to before me this 30th day of October, A. D. 1884.

OGDEN H. FETHERS,
Notary Public.

26 Circuit Court for Rock County, Convened November 10, 1884, at 9 o'clock.

Present: Honorable John R. Bennett, judge, & A. W. Baldwin clerk.

HENRY H. WATERMAN
vs.
THE CHICAGO & ALTON RAILROAD COMPANY.

On reading and filing petition and bond and on motion of Winans, Fethers & Jeffries, attorneys for defendant, ordered that

this action be, and is, removed to the circuit court of the United States for the western district of Wisconsin.

STATE OF WISCONSIN, } ss:
Rock County, }

—, William G. Wheeler, deputy clerk of the circuit court for said county, do hereby certify that the annexed affidavit, undertaking, writ of attachment, stipulation releasing attachment, summons, complaint, answer, petition, bond, and order changing place of trial are copies of the originals filed in my office in an action began in said court, wherein Henry H. Waterman is plaintiff and The Chicago & Alton Railroad Company, defendant, and that the said original papers are hereby transmitted to the clerk of the circuit court of the United States for the western district of Wisconsin pursuant to said order changing the plea of trial of said action.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Janesville, this 8th day of April, A. D. 1885.

[SEAL.] WM. G. WHEELER,
Deputy Clerk.

27 On this day, to wit, the 1st day of September, in the June term of the United States circuit court for the western district of Wisconsin, A. D. 1885, of said court, in the record of the proceedings thereof in said entitled cause, before the Honorable Romanzo Bunn, judge, is the following entry, to wit:

HENRY H. WATERMAN
vs.
THE CHICAGO AND ALTON RAILWAY COMPANY.

On reading and filing consent for substitution of attorneys for the defendant, it is hereby ordered that Messrs. Fethers, Jeffries & Smith be, and they are hereby, substituted for Messrs. Winans, Fethers, Jeffries as attorneys for said defendant.

On this day, to wit, the 21st day of December, in the December special term, A. D. 1885, of said circuit court of the United States for the western district of Wisconsin, in the record of the proceedings thereof in said entitled cause, before the Honorable Romanzo Bunn, judge, is the following entry, to wit:

HENRY H. WATERMAN
vs.
THE CHICAGO & ALTON RAILROAD COMPANY.

This day comes the parties, by their respective attorneys, and this cause came on to be tried; whereupon a jury is ordered to come,
28 who came, to wit, H. Shipnay, A. L. Lamb, Fred. C. Custis, Ulrich Buehler, H. C. Stanley, Joseph S. Kidd, M. M. Zeigler, S. A. Spafford, Jacob Roderick, Ole Munson, J. W. Jones, D. S. Damath, twelve honest and lawful men of the district, duly empanneled, tried, and sworn, and the trial commenced December 22;

23 & 24, 1885, on trial; also on January 4, 5, 6, 7, 9, 11, 1886. And now on this 12th day of January, 1886, the trial of this cause is concluded and the said jury instructed in the law by the court; and the jurors of the jury aforesaid do say that they find the issue herein in favor of the plaintiff and assess his damages at the sum of twenty-two thousand dollars.

And now comes the above-named defendant, by one of its attorneys, Ogden H. Fethers, and moves the court to set aside the verdict of the jury in the above-entitled action and grant a new trial upon the minutes of the court, upon the following grounds:

1st. That the verdict is contrary to the law and the evidence.

2d. For errors arising during the progress of the trial.

3d. For allowing improper testimony to be given on the part of the plaintiff against the objections of the defendant.

4th. For refusal by the court to charge the jury as requested by the defendant.

5th. For errors in the charge of the court to the jury.

6th. For improper conduct on the part of the plaintiff's attorney, Mr. Sloan, by reason of the statement by him made in addressing the jury against the objections of the defendant.

7th. That the verdict is excessive.

29 On consideration it is now here, on this 12th day of January, A. D. 1886, ordered that said motion for a new trial be, and the same hereby is, overruled; whereupon it is considered and adjudged by the court now here that the said plaintiff, Henry H. Waterman, do have and recover of the said defendant, The Chicago & Alton Railroad Company, the said sum of twenty-two thousand dollars so as aforesaid assessed by the jury, with three hundred and ninety dollars and eighty cents, his costs about his said suit in this behalf by him expended.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record and are in the words and figures following, to wit:

30 *Bill of Exceptions.*

Circuit Court of the United States for the Western District of Wisconsin.

HENRY H. WATERMAN

vs.

THE CHICAGO AND ALTON RAILWAY COMPANY.

Be it remembered that at the December term of said court appointed to be held at the court-house, in the city of Madison, on the 1st day of December, 1885, to wit, on the 21st day of December, 1884, the above-entitled cause came on to be heard and tried before the court, the Hon. Romanzo Bunn, district judge for the western district of Wisconsin, presiding, and a jury duly empanneled and sworn; and there came as well the said plaintiff, by William Ruger and J. C. Sloan, his counsel, and the defendant, by Ogden H. Fethers, its counsel.

Whereupon it was agreed between the parties to said action that the map attached to the complaint in said action accurately shows and represents the locality which it purports to show, and the same was received in evidence as a map of the locality in question in this action.

Whereupon the said plaintiff, to maintain the issue on his part, produced as his first witness HENRY H. WATERMAN, who, being duly sworn, testified as follows:

31 I am plaintiff; have resided in the village of Milton about four years; prior to that resided on a farm south of the village forty-two years, where I was born; have had no business or occupation, only to lie abed, for about three years, my last business being stock-buying near Milton and selling in Milwaukee and Chicago; was in stock business about nine years; prior to that was farming it and running a general store; also buying stock, hides, pelts, wool, and other articles to ship; went to Chicago with stock on the 28th of December, 1882. We had one car of cattle and one car half of hogs and half of sheep. We left Milton a little after 5 p. m. At Rockton I lifted up 16 sheep that had got down. They kept getting down. I found that I had got to remain in my car or else lose my sheep. Every little while I walked around and raised any that had got down. We stopped for luncheon near Elgin, Illinois. After luncheon I got in the car with the sheep and found some down, and so I stayed there with the sheep the balance of the way to Chicago. We unhitched from the train when we got to Chicago. I climbed out and walked around. It was a little bit cold and I had to keep moving to keep warm. I jumped into the car again and a switch engine backed down and hitched onto the front end of my mixed car, which, when I was going in, was next to the caboose, now it became next to the engine. After we had gone a little
32 ways our engine gave two toots. At that time I had what we called a gate. We put it in between the hogs and the sheep. I sat on this gate with my left arm holding onto the side of the car, the boards, and I had a brad-stick in my right hand, one I used to punch cattle. I had my elbow on the side of the car and my back was toward the engine, and I was facing the back end of the train. In a few minutes after I noticed the toots I noticed a switch-engine and a car of coal near switch "A." Almost instantaneously with my seeing that engine she started just as fast as she could, backing toward us, right towards my car. I hallooed and jumped towards the little end window in the rear end of the car. I sprang with my brad-stick. I had brad-— in my right hand, and I sprang with all my might and grabbed with my left hand the little round iron rod in the little window, and it seemed just as I grabbed that that car struck mine. There was a chug, and it came a little this way again, and then it seemed as though it chugged this way again, and then it chugged that way, and then for a minute I did not know where I was. As soon as I recovered I found that I was thrown along; my feet was up, I think, at an angle of about 45 degrees, and I hanging

with my left hand to the rod. My feet was up, and behind me was a lot of sheep crowding against me. They had been, all of them,
33 cuddled up together, and the sheep had carried me right along, I suppose. I lost control of myself probably, and they carried me along, with my feet up towards the top of the car, and I hanging with left hand to window. I tried to regain my feet. I tried to work myself along—get my legs over and get over the sheep's backs, to my feet. My sheep were, most of them, wethers, and had horns—some small and some large. One that they call a stag sheep seemed to be nearly in the centre of my back and pressing against me there. The engine kept scaring them. You know how they will take to crowding. He had large horns. After regaining my feet I tried to get out of the car. I raised my arms up and tried to raise the window, and a sharp pain caught me in my side, a little back of the side, a little more toward the back-bone, in the left side of my back. I let go my hold, and in probably a minute tried again and the same little pain caught me. Then I took my brad-stick and pried against the rod in the side of the car and opened it about 4 to 6 inches. Then I kind of pressed my side this way with my left hand and got my right hand where I could shove it, and shoved it back and climbed out of the car. I stepped around, thought I would take my sheep back, and this pain caught me again in my back. The car was tipped over as far as the line would let it turn.

The sills of my car, I should think, might have been
34 not exactly on a level—the top of them—with the top of the flat car. They braced up three ties against the car I got out of to keep it from tipping over. The car was tipped up on the side. I walked along on the opposite side. The coal car stood almost lengthwise of my car and had shoved in under the frame-work of my car; perhaps the wheels might have been two feet from the track, maybe more, maybe not so much—I could not say. The tender of the Chicago and Alton road seemed to be kind of mashed. It was stove up, and the water had run out. When inside the car I expected it to go over every minute. I should think the floor of my car was tipped up to an angle of 45 degrees. The sheep crowded toward the top and side of the car and were all piled up. The head of the buck sheep was against my back, like. The sheep were fat and strong, and pressed against me pretty hard. The bottom of the window I got out of would be about four feet from the bottom of the car, and the window was about 2½ feet wide and 3 feet high. The top of the window comes about even with the top of the car. There was no other way for me to get out of that car; the others were fastened on the outside. The iron rod I caught hold of was one of the rods of this window, running up and down. The window slid towards the left as I stood facing the rear end of the car, so that I pushed with my right hand. After I got out we were there perhaps a
35 half hour or an hour. They got out the engine and swung that car out from under ours and our car then dropped down on the track. My side ached a little, and I did not want to climb up in my car. I got on the engine after that, that was pulling our train, stepped from the engine onto the tender and held onto the

brake with my left hand and kind of turned round and kind of set upon the edge of the render, leaned up, and rode along down to the stock yards, and one time I was standing right on my feet and we went over some kind of frogs, where they cross with a jar, and I felt just a little sick at my stomach. I did not think anything of it. I had no breakfast and rode all night with the sheep, and I thought I would be all right when I could get some breakfast. When I was sitting I did not seem to mind that at all, the jar, and they pulled right along up. As quick as my cars were clear I started to a hotel and got breakfast. I got breakfast and went back to the commission men's office. I did not find them in the office. I went to find them. I told Mr. Bunker, the commission man, I wanted him to do the best he could on the stock. It was then about noon. On account of my wrench I thought I had better get home. I got a wrench in that car when they run into me in the morning. The car ran into me, and when they crowded me along they wrenched me. When they ran into the car that was the time I got my side hurt.

36 I went to the office to get my pass. I sat down in a chair and fell asleep by the stove. It seemed to me I could not sit down without dropping right to sleep. I tried to reckon what my cattle cost me, and some way I could not reckon. I tried to run up the columns, and some way I could not reckon then. I went to the depot, waited about an hour and a half, took the 5 o'clock train and went to Milwaukee. When I would stand on my feet when it went over one of those places where it jarred a little I felt a little bit sick in my stomach. I got a cup of coffee at Milwaukee. When we got to Eagle I felt a little dry and got a drink and felt a little sick again, when I got on my feet. I think it was 12 o'clock and 10 minutes when I got to Milton—about midnight. On the trip home I did not seem to feel any pain in my side so much, only when I would stand on my feet; when I was sitting I did not seem to notice it. I seemed to want to go right to sleep where I was sitting down in my seat. The pain, when I was on my feet, would be in the left side of my back; there if I would press my hand I would feel it so much. My wife bathed my side in camphor and heated a flannel and placed it on there. After I got to bed she did this, and in a few minutes I was asleep. I waked up two or three times before morning, and when I waked up I had a pain in my side. The pain was in the same place. The second time I woke my wife bathed me

37 with camphor. I sent for Dr. Borden before breakfast, and he came over, examined my side and back, and ordered some hot cloths and some hot griddles off the stove done up in papers, and then put them along me. Every day I would keep getting worse for about seven weeks, and one night as I was sitting bolstered up in my chair I felt a peculiar sensation coming over me. I called my wife and said I guess I am going, help me to my bed, and she and pa helped me into bed. Wife put snow and ice on my head, and when the Dr. came he left it on. We called Dr. Palmer then; think it was about the 19th of February he came to see me. I didn't hardly know nothing from that time for two or three months; then I commenced to feel a little better. I have had pains, but never

nothing like this in my back. When it takes me I have got to go down; that is all; to drop right down. I think I have not been free from pain since I was injured—all the time a dull heavy pain; at times very intense sharp pains. They were very frequent, and it seemed as though I wanted somebody to take hold of me and pull me and stretch me out as though I could not stretch myself.

(The witness testified lying on a cot and required to be raised up and his position changed by his attendant several times.)

These pains were very frequent up to the last 3 or 4 months—maybe six months; then those sharp pains have not been so fre-
38 quent, but this kind of dull pain remains all the time and tenderness remains. I have not been able to lie on my back since I was hurt. I lie on the right or left side, a little better on the right. I have attended to no work since my injury. My wife has taken constant personal care of me, night and day, until about 3 or 4 months, I have required waiting on. I think for about two years and a half my wife was up with me every night, from 3 to 5 times a night, and sometimes all night. Since that time from 1 to 3 times, until within the last, maybe, 2 or 3 months, I have rested a little better, I have only had to call her, maybe, once in a night, and usually lay now until morning. During the forenoon I don't think I am quite so restless; towards night I get tired. About a month ago I have sat up from 15 to thirty minutes, by resting on my arms, with a stand in front of me to rest my arms on, in the morning. When they could get me up, at noon, I could sit, maybe, 15 minutes. I cannot sit up unless I rest my weight on my hands. I have been wearing a plaster-of-paris jacket since a year ago last September. The first one was put on by Dr. Wm. Fox, of Milwaukee, assisted by Dr. Borden. Dr. Fox has only attended me to place that jacket on me. I think the jacket has helped me some. I am wearing the third one. Dr. Borden has put on the last two. Dr. Borden's visits
39 would average, I think, a daily visit for the first year and a half, and after that, maybe, three visits a week or four; and now, for the last six months, he usually comes once a week. I have called only Dr. Borden, Palmer, & Fox. Other doctors have come to see me—Dr. Conklin, of Geneva; one Dr. from Michigan; Dr. Booth, of Elroy, and a Dr. from Chicago, and Dr. Post. My daughter had to take care of me, I think, nearly two weeks. I have two daughters and a son. The oldest was sixteen last August; my boy is 14, and my youngest girl nearly 12. After six weeks from that time until now, I have not been able to read ever since I had that in my head. I can think a little better now than I could, but I can hardly think to make connections well. I can only write 2 or 3 words; some days I might write 2 or 3 sentences. I could not have anything read to me. For two years I could hardly bear to have any one walk across the floor, and could not even have them touch my bed; could not bear any noise, and you take a teaspoon and strike it against a cup and it would sound almost like a cannon to me. Wife had to rub my back three or four times a day, and my limbs are rubbed. At times I have had terrible headaches and

pain, and lately I have felt a terrible pain right up in the back of my head and in my forehead. I have a kind of roaring sound in my ears, sometimes. My speech has been affected ever since that night; it went to my head. I cannot talk so good—not since
40 then. I mean the time I had the peculiar sensation when I thought I was dying. I can talk better now than I could 8 months ago. Reading makes me feel as though I was stunned. I have not had a movement of my bowels unaided scarcely since I came home from Chicago that morning. I have had to take either a powerful dose of physic or an injection. I have to be assisted and cared for in the house in regard to the requirements of nature. I taught school after I was 17 years old. I last taught school about 10 years ago. I think I never called a doctor only twice in my life before this injury. One time I had the measles and the other time the bilious colic. I always considered my health good until the last three years. I never had a strong stomach. If I overloaded my stomach it would give me a colic, like. When I worked on the farm I worked right along every day. I usually went in with the stock myself in my stock business and did nearly all the buying. Since my injury I have been annoyed with my bowels. I feel as though it was filled with maggots and there is a kind of writhing inside of me, by spells, as though I was alive in there, moving all the time and a twitching of the muscles and flesh. I have not been able to turn over in my bed since my injury. When I am sitting on the side of the bed I have to have my feet lifted in getting them up on the bed, and always have to be pulled off
41 when I want to turn over. At times, since my injury, I feel as though there was a tight band across my bowels and across my forehead.

Cross-examination:

I made the complaint in this case. It was read over to me before I signed it by Mr. Ruger. About 10 years ago this winter I commenced merchandizing at Milton. I left the farm because I thought I would like to try some little lighter business. Some of the farm-work was a little too heavy. I had a kind of weak stomach, and if I worked hard I would have to eat hard and then I overloaded my stomach and would get a kind of gastric colic. It would not annoy me, only when I would overload my stomach. Farm-work did not make me sore in the small of my back. If I would take a scythe and mow or take a cradle the first day I would feel a little sore, but after that I never would throw it aside for no man. I would cradle with any man. I quit merchandizing in 1878. In 1879 I worked my uncle's farm. In 1880 I went into company with Dennis Williams and Lyman Borden in the stock business under the — of Williams. Borden withdrew in 1880. Williams and I remained together til- Dec. 29th, 1882. The stock was shipped in Williams' name. We shared equally in the profits. I did the most of the buying of stock. From Nov. 1st to April 1st we generally calculated to ship from 4 to 6 cars a week. I usually went in with the stock on night

42 trains, whatever the season might be. In going over the country, buying and selling stock, and in going to the Chicago and Milwaukee markets, riding on night trains, I was more or less exposed to inclement weather. I used to try to protect myself, and dress as well as I could, to prevent any injury from the weather. I seldom took cold. I very seldom had a cold; sometimes had a little cold in my head, but that is all; don't think I ever had a cold on my lungs in the world. I rode on a contract for two cars of stock. Unless we had two cars we had to pay. I would simply show my contract and that passed me. The stock contract I got from the agent called for a right of passage of one man in charge of two cars. With the exception of one time that Williams went I went every time with stock during the months of Nov. and Dec., 1882. I think I went twice before I was hurt. On the night of Dec. 28th, 1882, we reached Elgin about one o'clock, and I rode in the car with the sheep from there to Chicago. The night was cold enough; I recollect that. It was a slatted car. When not stirring up the sheep I would sit on the gate; gate about four feet high. There was fifty-one (51) or fifty-two (52) sheep. They were packed in pretty solid. If the sheep got down were they were packed in together he would soon be trampled to death or smothered. They would not try to get up unless you lifted them. They are the queerest things about that. I saw that C. & A. coal train start up and come down. I was sitting on that gate on the side nearest the C. & A. train. It may have been twelve (12) or fifteen (15) feet from where I was sitting to the rear end of my car. The hog had only a little over half the car. When I got up I gave a spring,
43 and don't think I touched the floor. I think I went straight over the tops of the sheep. I don't think my legs could touch the floor. I had my staff in my hand when I sprung. No sheep was injured in that car, to my knowledge. My weight was about 138 or 140. I could not say whether I touched the floor or the sheep. I was careless where I stepped. I must have grabbed the rod, because, when I came to myself, I was holding to one of the rods with my left hand, so I suppose I must have caught it.

Q. When you came to yourself you say. Do you mean to say that you lost consciousness there?

A. Yes, sir.

Q. But, if I understood your testimony, yesterday, when you started, you started for the end window, and reached and took hold of the iron rod with your left hand?

A. Yes, sir.

Q. You recollected that much?

A. Yes, sir.

Q. And that then there was an interval of a few minutes, more or less, that you did not recollect what occurred?

A. Yes, sir; I recollect it went chug and chugged that way a little and chugged again, and then I don't recollect after that for a few minutes.

Q. That is, the time of that chug and then the chug again, you then had, as I understand you, hold of that rod?

A. Yes, sir.

Q. So that up to that time you had not lost consciousness?

A. No, sir; I recollect the chugging and that I had hold of the iron rod. When I returned to consciousness I still had hold of that rod, and in my right hand, I think, I still had my brad-
44 stick. I can hardly tell you my position when I returned to consciousness. I was grabbing the rod and would think perhaps was about in this position (indicating); here would be my shoulders and up here my feet. The hogs squealed, and that made the sheep crowd from the middle of the car towards the end, and there the steam of the engine made them crowd towards the side, and they carried me right along up towards the corner of the car, towards the end and roof. The sheep's heads would be crowding and I lying mostly on the heads of the sheep; lying partly on my back and left side. The buck sheep was crowding against my side and back. I kind of lay on his head like. His head was pressing against my side and back. My feet were up near the roof of the car. The sheep were piled up one on top of another clear over on the side of the car and up in the roof of the car. None of them were injured in the slightest degree, to my knowledge. I did not examine any of them. When I had hold of the rod I was facing the end of the car. The cross-pieces under the end of my car were all battered the whole length of my car, and I think the one in the rear end was battered the worst. It may have been a minute and maybe three that I was unconscious.

Q. Are you able to say what it was that rendered you unconscious there?

A. I don't know whether it would be the shock that was given me or the scare, it frightened me so; probably the shock that was given me.

Q. Were you conscious of any shock at that time?

A. I was unconscious and I suppose the shock produced it.
45 I cannot say whether there was or was not any disturbance or sensation about my head when I got out of the car. I don't know as I can tell exactly how my head felt when I got down on the ground. I felt all the time as though a little cloud had passed over me—a kind of stunned sensation. I don't know but I walked around as good as usual. When I got down on the ground the pain caught me in the side; then when I was walking, if I stepped down to jolt a little, I would feel a little pain in my side. If I put my hand there I did not feel hardly any pain. My vision seemed to be all right. I noticed nothing at that time strange or different about my speech or about the use of my hands and arms, and I don't recollect particularly that I felt any sickness at the stomach while there on the ground. I had had no sleep during the night. I had had no food since about midnight. I last passed urine just before I ate about midnight. I noticed nothing about its passage whether it was free or otherwise; it was just as it always had been. The last movement of the bowels I had before the accident was the morning before I left with the stock, my usual time. My bowels were generally very regular after I got out of the car. While

I was walking around sometimes I would feel a little shiver of the flesh, like a tired colt, sometimes in one place, sometimes in another—intermittent. Don't recollect any feeling of chilliness. While walking around the cars at the place of collision I felt this pain in the side and back if I happened to kind of jar a little. I do not recollect of any of those sheep striking against me forcibly, but when
46 the cars would chug. The sheep would come up and go back, and then chug again and then the cars would chug. I would feel the force of the sheep. I felt the force of the sheep the whole length of me, from my shoulders through the whole length of my body. I don't know as I felt it at any particular spot. I do not recollect of the sheep giving me any hard blows. I could not say as to that. I think the place where I felt the pain is in the upper part of the upper lumbar and the dorsal, the upper part of that; about the ninth or tenth vertebra from the base of the spine. The pain I first felt is maybe two or three inches from the backbone. I ate about as I usually do at breakfast after the night of the injury. Breakfast is always my best meal. I presume I smoked my usual number of cigars that next day—generally smoke after meals. I smoked one cigar going home between Chicago and Milwaukee. I think I took a drink of whiskey before I had my breakfast the morning of the accident; did not drink any after that during the day; there was nothing out of the ordinary in my eating, drinking, and smoking that day; there was no discoloration of my side and back and no breaking of the skin that I know of, and no bruised condition or appearance at that point, nor any other part of my body. I don't think there was any swelling at that point that first day that I noticed. The next morning I noticed a slight swelling. I knew this from the doctor. I presume I put my hand there after my clothing was removed after I got home, but I recollect of no
47 swelling there; there was no external evidence of any injury whatever so far as I know, and there has been none to my knowledge.

At the time of the collision I think I was pretty badly scared; don't think I had got over it when I got home. My left ear is a little incapacitated for hearing, but I had that before I was hurt. I do not perceive any difference since. In about seven (7) weeks after my injury everything began to taste about alike. I had never had any rheumatism. I was hurt on Friday and I first noticed a change in my power of locomotion the next Sunday afternoon. I got up and went out into the sitting-room. I could not seem to lift my legs; my feet I wanted to kind of drag them. I did not notice it in my right leg very much, but this leg the most; there was no jerking or pulling up of the knee. I first noticed a changed condition in my speech about March 1st, 1883; right along after I had that bad night when it went to my head, and then I could not speak. The next week after I got home I noticed a changed condition of my head. I got home on Friday night at midnight, and on Saturday my head felt kind of clouded once in awhile; first noticed pain at the base of my brain after it went to my head that night; ever after that I have had a pain there. It seems to be more than it used

to be. I was out to the barn a few minutes to see a sick horse the next Monday after I got home, twice; it is about 2 rods. I have no recollection of any pain except at the point I have described, when the doctor pressed upon my back that first Saturday. In the fall of 1881 I was offered $1,200 a year to go on the road and work
48 for the Northwestern Stock Co. and I refused. I thought I could do as well in my business and be at home. I never had any blood disorder; had a few boils when I was a boy.

Redirect examination.

The feeling I spoke of like a sensation as if there was a knob or knuckle at some point in my back is right on the back-bone; it seems to me all the time as if I was lying against a knot; it is right on the back-bone. At first the pain was away a little from the back-bone—about an inch.

MARTIN MURPHY, sworn for plaintiff:

Reside at Brighton Park, Chicago; tend switches there for Pittsburgh, Cincinnati and St. Louis railway, sometimes known as Pan Handle road. I tend 6 switches there regularly and have for 6 years. (Map in evidence shown witness.) I recognize that as a map of the locality. A good many trains pass there in a day. Trains come over there in going to the stock yards—trains of almost all the railroads in Chicago. The Chicago & Alton railway comes in there with coal, maybe 2 or 3 times a week. They had been using them little or much since I have been there. The Chicago, Milwaukee & St. Paul generally cross over on the Union Stock Yards' track to the stock yards. I should judge it would be a mile and a half from Archer avenue to the stock yards. I should think it is about 5 miles from Archer avenue to the central portion of the city of Chicago. Ackerman's coal switch is south of Archer avenue, between that and *and* Western avenue. A little spur runs off
49 our main track to it. Western avenue is the next street south of Archer avenue.

The east main track—the inside track—is the proper track and the safest for a train to take in going to Ackerman's.

If a train is at switch "A," on the west Pan Handle track, it would go to Ackerman's coal yard by going right down that west track it was on. Brighton Park station is on the west side of the tracks, north of Archer avenue about a block. It is my duty to give trains the right of way there, to put them in their proper places, signal them, and tell them when to move. I opened the switches and closed them. Trains of the C., M. & St. P. & C. & A. (the defendant Co.), collided there Dec. 29th, 1882. The C. & A. train had one car and an engine ahead; C., M. & St. P. had a train of live stock. On that morning one of our trains came from the north and came south and crossed on the south connection and I let it out here (indicating a track to the east). The defendant's train followed then and stopped somewhere here (indicating a point south of switch "B" on the track on which switch "B" is located), and crossed here on the north connection, onto the west track, to

this switch "A," and stopped on that switch so it could not be thrown. They did not go far enough north so it could be moved. The Milwaukee train then came on south and defendant's train backed down right on this switch "B" and struck first car next to the engine of the Milwaukee train. The car attached to the Alton (defendant's) engine was loaded with coal. When they began to back they were clear of this track the Milwaukee & St. Paul
50 train was coming down on. I signaled the Milwaukee train to come on, they had the right of way there. The Milwaukee train started first and came quite a piece, and while they were coming on the main track the C. & A. began to back and ran into this first car. The C., M. & St. P. train came from the north and stopped on the north side of Archer avenue for the C. & A. engine to get out of the way.

The C., M. & St. P. train waited for my signal, and when I signaled them they had the right of way and came right along. When I signaled them I was at switch "B," on the same track they were on. They had got down pretty near to switch "B" when the C. & A. began to move. I did not give the C. & A. any signal to move backward. I did not see anybody give them a signal. When I saw them moving backward I could see they were going to come into a collision with the C., M. & St. P. train. I tried to stop them with my hand, flagging down with my hand—signaled. Thomas Mann, who tends switches with me, was there at the time. When it started to back, the car of the C. & A. train stood on switch "A." I could see the target plain and tell by that that it could not be moved. It is about seven feet high, and on the top a red and white signal to show whether it would be right or wrong to any one taking notice. When it stands straight up there is no connection with the cross-over; when it is connected with the cross-over track the
51 target falls down about so far (indicating). By looking at the target any one could tell that the switch was not right for them, and that they were going back into the C., M. & St. P. train. They could see the switch target from the engine. It stood about 5 or 6 feet west of the west rail; was on the west side of the west track. The man on the west side of that engine could see it if he took any pains. It was about eight o'clock in the morning—a bright, clear morning. The coal car scraped the St. Paul engine first and then it scraped a little of the car and caught hold of the corner of the stock car and raised it up about 3 feet, I should think, from the track. There were sheep in that car and, I think, hogs, too. I saw no one get out of that car; should think it was an hour before the cars got righted. They did not have to prop up that car. I do not think they did prop it; do not think they would have to. When the cars came together in collision I was about 100 feet south, on the east Pan Handle track, and could see the whole thing. Sometimes the C. & A. men would throw the switches for themselves when they came there and sometimes we did it for them if we had time. Thos. Mann, my partner, threw the switches that let them up to where they went, and stood on the west track. By going where they did they would be going where they wanted to go and getting out of

the way of the Milwaukee train, at the same time, to let them go to the stock yards.

Cross-examination:

Q. Your deposition was taken in the city of Chicago on the
52 part of the plaintiff last December, was it not?

A. Yes, sir.

Q. And you there gave testimony concerning those matters to which you have testified here?

A. Yes, sir; I am more thoroughly acquainted with what I had to do now than I was then.

Q. Your memory has been refreshed since then?

A. Yes, sir; that is it.

Q. Notwithstanding it is a year later, you know the things better now than you did then?

A. Yes, sir; because I did not know what I wanted to do when I went that time. I did not know what it was for or anything.

Q. You did not know what they wanted of you?

A. I did not know what questions were going to be asked or nothing else, but now I partly guess. I took a better understanding.

Q. You have been told since?

A. I see for myself what to do better. Thomas Mann is employed and paid by the stock yards company. I have no supervision over him, or I will say yes. We gave ourselves the authority to exercise authority over one another. We help one another out, and at the time of the accident the Pan Handle Company knew that we worked into one another's hands, and the stock yards company knew that we helped each other in turning switches. I suppose they did, for they were often there and never said different. The Pan Handle Co. never gave me any directions to attend to any other switches but their own.

I was put there in their employment and told which were
53 their tracks and told to attend to their switches. It was a matter of convenience between Thos. Mann and myself that we helped each other; we always did it; it was between ourselves to help each other out. I was not paid by the stock yards Co. and Thos. Mann was not paid by the Pan Handle Co. Just before the accident the defendant's train backed down the inside Pan Handle track across switch "B" and rested, head north. I was then at Western avenue letting out one of our trains, and when I saw defendant's train backing down I knew she had to keep on the inside Pan Handle track to get to Ackerman's switch, & I had to stop them to throw that switch. Thos. Mann was at switch "B" at that time. Thos. Mann threw the Pan Handle switch, switch "B," for the C. & A. train, and those are the tracks I am employed to attend to. Mann could not throw switch "A" for the C. & A. train. He tried to do it, but could not; the car stood about half way on the switch. I watched the whole business. All the personal knowledge I have of this is that I saw the switch target after the C. & A. train had moved up and stood partly on switch "A." It was headed north and intended to back down the outside west track to Ackerman's

side track, but instead of doing that it backed again over that crossing. From the time the Milwaukee train moved from Archer avenue, where it had stopped, away down to switch "B," she did not stop until she struck the Milwaukee train. I heard the noise of the collision; of course there was a shock; there must be a jar as long as the car is lifted up 3 feet. The wheels were lifted from the track about 3 feet.

54 Q. Isn't it the fact that the St. Paul car settled right down on the track in the very spot where it was raised from as soon as the C. & A. car was pulled away?

A. Yes, sir; it settled down. It was not thrown out of the track. If one of our trains was due at my switches at a certain time I would not let a foreign train onto the track at that place, if I saw it, and it would have no right to come on without my permission at any time. My directions would be law there. I had the two main tracks of the Pan Handle Co. where this accident occurred under complete and absolute control. I saw a man around there with a long stick in his hand after the accident. I am almost certain that the gentleman who was brought in here yesterday on a couch was the same man. I did not hear him say anything. He did not appear to be excited when I saw him. I did not see anything the matter with him at all. He seemed to be perfectly cool. I was not speaking with the man, but I just saw him. I did not see anything wrong with him when I saw him. There was nothing in his manner to lead you to think he had been hurt in any manner. I saw nothing that would make me think that he was hurt.

Redirect examination:

This same engine of the C. & A. came there before frequently, at an average every day. They had been in the habit of going through switches according to the way they were opened for them or signals given them by me or Mann; think that the No. of the C. & A. engine was 124.

55 THOMAS MANN, sworn for plaintiff:

Reside in Chicago, and am a switchman for the Union Stock Yards and Transit Co., and have been for 8 years at the place in question. My beat was from Archer Ave. south to 39th street, about 325 yards. My work is to turn switches for all the trains that go to and from the stock yards. The witness Murphy has worked there with me going on 6 years. The defendant's trains were in the habit of coming there every day in the year, I think, since the tracks were built. On the 29th of Dec., 1882, the C. & A. engine ran from the C. & A. Y onto the Pan Handle east track south to Archer Ave., and south of Archer Ave. it came over those connections that are called B. They stopped there, and at the same time the Milwaukee was coming after them, engine 530, and when this engine 124, belonging to the C. & A., with a car of coal, I guess, stopped I went and turned switch "B." Mr. O'Keefe had been at the south connection, and I went to switch "A" and turned it and gave them a signal to go ahead, and so they did, and when they

were pulling over the switch somebody from the engine says, "All right." At that the engineer commenced to back onto the connection, where he came from again, and I said, "Hold on or you will go into the Milwaukee." At that time he saw his danger, and the engineer done all he could to stop, but not in time, for he lightly struck the Milwaukee train and hardly raised their wheels—raised them about two (2) feet or perhaps a little more from the rails—kind of turned the car over—came to-
56 gether, that is all. Then I came from the west Pan Handle track onto the east Pan Handle track, where the car next to the Milwaukee engine stood partly turned over, and I saw a man standing by the car with a pole in his hand, and he asked me how long he would be detained there. I said not very long; perhaps a half hour or three-quarters of an hour, as soon as the C. & A. was pulled away; that his car would drop down all right, and then he could go to the stock yards, and he regretted being detained; that he had been up all night with his stock to keep them from tramping on each other, and he wanted to go to the yard as soon as he could. The C. & A. engine first went south on the east Pan Handle somewhere below switch "B" and stopped; then I opened switch "B" and let them go northerly again onto the west Pan Handle track. I turned switch "A" for them and gave them the signal to come ahead north, and so they did, and they did not go far enough north to clear switch "A;" then somebody on the engine said, "All right," and they started to go right south over the crossing they had come on towards the St. Paul train. I did not give them any signal to back towards the crossing where they came from. I stood at switch "A" waiting for them to get off from it, so I could turn it, and some one on the engine said, "All right," and they started to go right back, and I said, "Hold on" and signalled with my hand across the road. I said,
57 "Hold on or you will go into the Milwaukee." At the same time the Milwaukee was moving ahead towards the stock yards. I cannot say who gave the Milwaukee the signal to go ahead; I did not. I don't know whether the men on the engine could see me and see the target on switch "A;" I suppose they could. I should think that target was over 5 feet high. I could tell standing 100 feet away, looking at that target, whether the switch was open or not, by looking at the staff and target. All that you want to do to tell whether the switch is right is to look at the target. When the main track is whole and connected the target stands straight up, and when the cross-over is connected with main track the target is pulled over to the west 12 or 15 inches. As the target set at that time it stood 3 feet or so from the nearest Pan Handle rail. When the two trains came together you could scarcely hear it. Of course, they came together very slow. After the C. & A. engine started the St. Paul engineer called for brakes. The wheels of the car ran into were raised from the rails about two (2) feet and the body of the car was tipped over about 3 feet, being coupled onto the engine, and other cars held it. I did not see anything done by way of propping against it to keep it from going over. I did not stay there long after the accident occurred. I saw this man standing by the car, and I told

him the car was not injured much. I had frequently seen
58 that C. & A. engineer there before, I guess so.

Cross-examination:

I have no employment by the Pan Handle Co. at all. I turned switches for Murphy and he for me. After the accident I only saw one man with a pole in his hand. I think the man who was brought in here yesterday, on a cot, looks something like him. While talking with me there he complained of no injury. His appearance did not indicate that he had been injured in any way. I did not look at him very sharp. He did not seem to be at all nervous or excited. The Milwaukee train at the time of the accident was moving very slow, and had gone about 50 or 60 feet. They had, probably, 20 cars. The two Pan Handle tracks are about 7 feet apart, and from point to point of the connection is, probably, 75 feet. A freight car projects out beyond the rail about 2 feet on each side, and the tank of an engine about the same. The coal car of the C. & A. was standing on switch "A." When they came together both trains were moving about as fast as a man would ordinarily walk. The Milwaukee train had put on brakes and the C. &. A. engineer had reversed his engine before they came together.

Q. If I understand you, the box of the car, as you recollect it, was 3 feet from the rail?

A. From the rail and the wheels, about 2 feet.

Redirect examination:

59 An ordinary stock car will weigh about 15 or 16 tons.

JOHN J. FLINN sworn for plaintiff:

Am a switchman for the St. Paul road and reside in Chicago. I was on the engine of the St. Paul train on the morning in question. On that morning we pulled down to within 40 to 60 feet from Archer Ave. and stopped on east Pan Handle track. The C. & A. was down ahead of us, with one car. We had to stop to let them get out of the way to go where we were going. They pulled up, gave us the switches, and we started and, I should judge, we went about 100 or 125 feet when the first that attracted my attention our engineer—he saw them just about as they struck him, just as they were almost onto him—he hallooed and he pulled the whistle for brakes, and by that time they had struck the cab of our engine, and I jumped out of the fireman's window. The car of the C. & A. scraped our tank, twisted our cab, and broke 2 of the windows. The tank of the C. & A. engine kind of weighed under our first car and canted it over. The wheels were in the neighborhood of 2 and ½ feet from the track. We propped it up with a stick—I forget whether it was a tie or a post—only one prop. I saw a man come out from between the cars. I could not say if he was in either car. He had a brad pole. I think the plaintiff is the man, but would not say positively; his appearance has changed a good deal. We

were detained there from 40 to 60 minutes. The man was
60 punching up the stock, trying to take care of them. I told him to get out of there—it might tip over. In going south on west Pan Handle track you could tell by the target how the switch was.

Cross-ex.:

Our engine did not require to go to the shop that day for repairs. The stock car was scratched a little and the corner of the roof raised off. None of the slats in the stock car were broken, to my knowledge. The body was tipped up at southwest corner about 3 feet from ordinary position. The other end of the stock car was only tipped about 8 inches. There was a jar and grating crash when they came together. After the C. & A. car was drawn away the stock car settled right down on the track; it was not derailed at all. The man with the pole complained of no injury at any time, that I heard. He did not appear to be injured. I did not stop to look at him. After we got our train on he made a remark that he would like to get to the stock-yards; that he was not feeling well, or some remark about being tired or hungry; told us about being in the car—said he could see the C. & A. train coming into us—and hustling for the end door to get out as quick as he could.

Q. Did you testify to this when your deposition was taken in Chicago: "He made the remark that he was in the car and said if it had tipped over he was on the top side and could have got out all right." Is that correct?

61 A. I judge it is. I don't think it is just as I swore.

Q. Was this question asked you and did you make this answer?

Q. "I understand you said he had hold of the side of the car?"

A. "He said he intended to or was holding on, and I could not say which. He made a remark about his being cool and able to take care of himself."

A. He made a remark something to that effect. I don't know as those are the words or not. He made the remark that he knew what he was doing and could take — of himself.

Q. Did you not use the language in Chicago that I read?

"He made the remark about being cool and able to take care of himself."

A. Well, to that effect, I guess I did.

Q. And in answer to that question "you said he said something about protecting himself from injury," did you say "he said if that car went clear over he could have hung onto the car?"

A. Yes, sir; I said that. He made no pretense of any injury in my presence at any time, with the exception of saying that he was rather hungry or sleepy or sick—something that way; that he was in a hurry to get rid of his stock. He made some remark, but I don't know what it was. In going down to the stock yards he rode on the gangway of the engine—that is, about two miles. The gangway of the engine is the little passage-way between the cab and
62 the tank. Riding there would be different from riding in a

sleeper or a palace car. He made no complaint going down to the stock yards or upon reaching the stock yards, in my presence.

Redirect:

We gave three signals to let the switch-tender know we wanted to cross over onto the stock-yards track. The switch-tender, Murphy, gave us the signal to come on south. He was at switch "B" then, and our train was just north of Archer Ave. The C. & A. train was moving north when Murphy gave us the signal, and had got clear of our track.

M. S. ROGERS sworn for plaintiff:

Am a locomotive engineer on the St. Paul road. I was pulling the St. Paul train at the time of this collision. All the trains coming in there signalled the switch-tenders by whistles to indicate where they wanted to go; what switches to turn for them. The C. & A. train ran up on the west Pan Handle track, and I started ahead south. They ran north, so their engine was about even with mine, and I started down. I got near the frog of the spur and looked around and saw them coming down on the spur, coming right back on the same track they ran upon. They ran the car up so it stood on the switch rail of switch "A;" whether far enough ahead so they could throw the switch I could not swear, but I do not think they ran far enough so it could be thrown. When I saw them coming back into the spur I whistled brakes. I did
63 not reverse my engine at that time, because if I had they would strike right into the side of my cab. I let her run, and worked steam til- they came so near that when they struck and when they ran together I reversed my engine to keep from dragging them. The top of the Alton car struck the corner of my cab. My engine or tank threw that car off the spur track onto the ground, and it stood, when we stopped, right beside my tank and probably a third of it back of the tank. There was no work done on my engine to repair it. I should think the next car back of my engine was raised up one-third of the way to tip it over. There was one or two props put under it to keep it there, I think.

The tank of the Alton engine had a hole cut in it. You can tell about the tracks at switch "A" by the target.

Straight up and down connects the main track, and it is thrown about one-third of the way over to the ground to connect the cross-over or switch track, I should think. The switch target stands off from the rail, looking from your engine ahead or back, alongside of your train; you can see them easy enough.

I saw a man who looked like the plaintiff, with a broad stick in his hand, riding in the gangway of my engine afterwards.

Cross-examination:

I think the C. & A. engineer reversed his engine before we came together, but I do not think that lessened his speed a little; think the engine slipped. After the collision I saw a man there with

64 a pole in his hand. He did not complain of any injury that I heard. I did not pay any attention. I did not listen to him. I could not tell whether he appeared excited. He looked a little frustrated, I thought, when I first saw him. At time of collision there was quite a crash. I testified in Chicago that he was perfectly cool and gave no evidence of being excited, to the best of my judgment. I understood at that time, and still understand, that the tracks there are under the control of their own switch-tenders, and it was my duty to obey them. They were masters of the situation. If they did not throw the switches I did not run over them.

Dr. HENRY PALMER sworn for plaintiff:

Am a physician and surgeon and have been for 30 years, and am at present surgeon general of the State; am also professor of operative and clinical surgery in the college of physicians in Chicago. I saw the plaintiff in March or April, 1883. I was called in for a consultation. At that time he seemed to be suffering from a difficulty of the spine, which involved the system pretty largely. He had tenderness and soreness of the spine; complained of pain and difficulty in motion—difficulty in standing erect and in using the lower extremities. This was manifested, I think, more in the left leg than in the right. He also complained very much of
65 pain in the spine and down the legs and in one testicle. I next saw him some six weeks or two months after that, when his condition was very similar to what it was on the first occasion. I saw him some two months after that date, some six weeks since, and to-day. On the third occasion of my seeing him there was but little change; some of his symptoms were aggravated and others were improved. About six weeks ago his condition had improved in some respects and in others it was not so good. The first, second, and third times I saw him there had been but little cerebral disturbance and little or no affection of the speech. The last time I saw him I found his speech considerably affected, and also a muscular tremor of the upper extremities, and rather less command of the upper extremities than he had at previous visits. To-day there is a slight improvement in his muscular ability. He can stand better and walk better. I think he has been entirely incapacitated from doing any business from the time I first saw him—any business of a general nature. The improvement that has taken place within a few months at that stage of the condition would indicate that there was a reasonable prospect of improvement still continuing; but it is very questionable about his permanent recovery. I think that the changed conditions existing about the spinal cord are such that the recovery will never be complete; there will be partial
66 loss of power and of the functions of the cord. I should judge that there would be a fair prospect of his being able to attend to some business—that is, if his improvement should continue, and I see in his condition no reason why it should not continue; but those permanent changes resulting from inflam-atory action will remain permanent to some extent, not entirely removed in all probability, and

as long as those remain to any extent, just so long will he be measurably disabled. I think you may consider him permanently crippled. The probabilities are not in the direction of its finally causing his death; there is a possibility. The same causes do not exist that did at times since. There is no apparent inflam-atory action now. He is now suffering more from the effects of that inflam-atory action and the changes which have occurred as the result of that inflam-ation. Those changes usually improve by time. The changes that I refer to would be those changes that have produced the effect of the muscular system which we see, by the spinal cord or its membrane being involved. The product of inflam-atory action, the deposit of lymph or material along the spine, and the changed conditions in its functions—that will not be fully restored.

Cros-ex.:

When I saw him in March or April, 1883, there was no
67 difficulty in his articulation that was preceptible. There was not much cerebral disturbance at that time; no more that the general cerebral disturbance that would accompany the nervous irritability he was suffering from. I think it was some six weeks since I noted the cerebral disturbance. At the time I first visited him he said no more about a disturbance of the brain having occurred before that time than general restlessness and sleeplessness and discomfort arising from his condition. He said nothing about not being able to figure up an account of cattle—inability to do anything of that kind in a mental way. I heard nothing of that kind from him. He was in bed when I first saw him, I think, but got up while I was present. Dr. Borden was present. I got a history of the case from both Dr. Borden and the plaintiff. Borden told me what his treatment had been up to that time. I do not know that I made any change in the treatment. I think I made some suggestions in addition to what had been given. There could be no disagreement as to the line of treatment or as to his physical condition at that time. His condition was well defined. I don't think he suffers much pain now, and the probabilities are that that condition will continue. I think there is a general marked improvement in him in some respects; that improvement is more manifest in the muscular actions and the paralysis of motion and sensation, more
particularly of motion. He has partial paralysis. There is
68 some some diminished power of sensation, but the loss in motion is more that that in sensation, and it is more in one limb than in the other. This loss of power in the muscles is more confined to the lower extremities. It does not seem to involve the upper extremities as much, nor the abdomen nor the functions of the system, the bowels, or urinary organs. My first visit was the 19th of February, and the 2nd of March the next.

EDWARD A. HOLMES sworn for plaintiff:

Am a merchant; have known plaintiff intimately for 40 years, perhaps. I always considered him to be a healthy man prior to his injury. I don't know that I ever heard of his being sick before

that. I think he could do a good day's work at any time. He has not been able to attend to any business since his injury. I have seen him once a week on an average. He was generally in bed. His wife would assist him to eat, and he would remain up 10 or 15 minutes. He seemed to suffer greatly at times; required constant care; could not turn in bed or move himself without assistance.

HENRY BACON sworn for plaintiff:

Know plaintiff ever since he was a boy. Before his injury I did not live within 4 miles of him. He used to be a hard-working, industrious man on the farm; since his injury have lived near him and seen him once a week or two. He has not been able to do anything since his injury; has been confined to his bed. His wife had to be up with him night and day. I think the difference
69 in his speech came on him gradually, along some time in June or July the next year. There is not much difference in his speech now from what it was in July and August, 1883.

WILLIAM A. WATERMAN sworn for pl'ff:

Am half brother of plaintiff; live in Iowa; visited him 4 times since the injury, staying a week or two with him. He was always a strong, hard-working man. Since the injury, when I have been there, he has been in bed; has never been able to help himself in the least, as I could see, without assistance. The first time I saw him after the injury his speech was about the same as it is now. That was some 8 months after. When I have been home I have attempted to read to him and he would always stop me and tell me that he could not stand it; that I might tell it to him after some little time.

Cross-ex.:

I could converse with him. Sometimes he would have to stop me; could not converse but a little while at a time. I was not informed that my presence would be necessary here as a witness to testify. I was not brought here for that purpose.

Q. If you take, for instance, this newspaper, and there is an item of 4 or 5 lines, he could not stand it to have it read to him, but you lay it down and repeat the same words to him and that was all right; do you know of your own knowledge how to account for that?

A. No, I do not. I do not attempt to explain that part of it.

T. D. GRIGGS sworn for pl'ff:

70 I have known pl'ff for 27 years. I should think he was quite a quick and hard worker prior to his injury. Since his injury I have never seen him when I thought he was capable of doing anything. I saw him on New Year's, the third day after his injury. I saw him try to walk; I think I saw him try to walk across the floor. He seemed to be quite stiff and lame at the time; walked slow. He seemed to walk a little one-sided and generally

put his hand around on his side. I have been at his house perhaps once in 2 weeks since that, and have never seen him up. He has required a great deal of care. His wife has taken the principal care of him, I think. He has required care in lifting and turning over.

BESSIE WATERMAN, sworn for pl'ff:

Am a daughter of the plaintiff, and 16 years old. Father has been unable to work and take care of himself since his injury. He has required assistance night and day. He cannot turn over or sit up or move his body or limbs in bed without assistance. He has needed assistance in turning over 4 or 5 times a day. Mother generally did it. About 6 weeks after he was hurt he had a very bad spell. After that two of us could not be in the room at the same time and talk for about 3 months, and from that time his speech has been defective. He has been unable to read himself or hear but little reading by another person. There was a time when we had to be very careful about walking across the floor, but now I
71 don't think it disturbs him. That time lasted about 6 or 7 months. The reason that noise affected him was that his nerves were in a very bad condition.

Cross-ex.:

Up to six or seven weeks after the injury when he had the bad spell there was nothing noticeable about his speech. Up to the time that he had the bad spell he would generally sit or lie in his room and read newspapers some when sitting. After that he could not stand any noise or jar. It disturbed him some before, but not as much. After the bad spell we kept ice-cold cloths on his head all the time for six weeks or two months. He could not talk; did not appear to be able to think very much. Before the bad spell he could not walk without assistance; had his cane and, I think, mother helped him. Before bad spell he used to ask us not to walk too heavy.

Dr. WM. BORDEN, sworn for pl'ff:

I reside in Milton; have been practicing medicine 36 or 37 years; have known pl'ff 31 years; have been his family physician 15 to 17 years; saw him during that time and before frequently; doctored in his father's and grandfather's family. Prior to Dec. 29, 1882, he was able to work and attend to his business, as a general thing. He was well, as far as I know, as a rule. Prior to Dec. 29, 1882, I had never attended him for anything but colic gastralgia, an indigestion, on 2 or 3 occasions; the last time, 4 or 5 years prior to 1882. I saw him the morning of Dec. 30, 1882, between 7 and 8
72 o'clock. I found him with soreness and pain, on motion, on the left side between the angle of the ribs and the back, nearly opposite the small of the back, right opposite the small ribs and the last long rib; round the short ribs, right in between that and the backbone, there is a place about the size of my hand along the back, the 11th or 12th vertebra of the back, where the muscles are. There

was no discoloration of the skin nor any bruises and no swelling, I think. I examined the spinal column and found no tenderness and no flinching when I pressed upon the spine or upon the prosessess, but there was a tenderness when I pressed on the long rib or under that—the long rib. At that time his system seemed to be in a depressed condition. The next day I saw him again. He was in the sitting-room, but lying on the lounge. He thought that his side felt a little better. He seemed to be in about the same condition and remained so until about the middle of the next week. About that time he began to complain of a pain in his back and he could sit up with difficulty and he didn't like to. It hurt him some to get up, still he got up himself and would lie down, but when lying down he wanted something against his back. There wasn't much or any fever or excitement of the system. He remained in that condition some time and he went into the bed-room, and after that, the Sunday following, he
73 staid in his room altogether, on the bed most of the time. Still, the pain had left his side and it was located then almost entirely in his back. He would sit up some in a chair, but to sit up he had to have something down so as to keep the chair from touching his back at that place and something across his shoulders. The pain seemed to be in the lower dorsal vertebra and possibly in the upper lumbar, the upper one; it seemed to be more confined to the lower dorsal vertebra. The pain in the back seemed to be more confined to the lower dorsal at that time; it had gone down. There was no excitement of the arterial system and he seemed to be suffering something of a nervous depression. He remained very much in that condition for 3 or 4 weeks, then he began to have a pain in the left testicle, in the cord, and a pain in the calves of his legs some—sometimes shooting down his legs—and the left leg became atrophied a little, the muscles seemed to become softer in that than in the other. Soon after that—5 weeks or so—I noticed the loss of sensation and a loss of motion in that leg more than in the other. At the end of about 6 or 8 weeks he had more fever than he had had and his testicle gave him considerable pain, and along about that time he began to have a feeling of constriction about him, a little, through the nasal; that was not a very marked feature or a very prominent one, but he had it more or less every day for some time. Then he complained of some pain like a knuckle about the lower portion of the 10th vertebra.
74 That would not be constant—all the time. At times it would be a little easier than at others. He doubled up his finger and said he felt as though that was poking into him, and if that was out of the way he would be pretty comfortable. During that time he was unable to get up without help and he was unable to turn himself over. He could not lie on his back alone. I mean he could not turn himself over; he had to be helped in turning over. He lay most of the time on his right side. He was turned over by getting him so he could sit up and work his feet around and then he would lie over on the other side. You could hardly take him and turn him right over without he would complain of the place in his back hurting him. Both of his feet would have to be lifted. He

would read a little. He kept the run of the markets, he said, a little. He didn't improve and there was some fever. I think it was in April he had the peculiar sensation he spoke of. That was after Dr. Palmer had seen him, I judge, that he meant. It was soon after Dr. Palmer's second visit that Waterman had this spell—that was an extreme pain in the head and some in the back of the neck—a severe pain without fever. That lasted him so that we had to have watchers and people to sit up with him nights for 2 or 3 weeks, and, I think, for 2 or 3 weeks the neighbors came in and staid up with him. Along in June he began to get better. He could not
75 read very well, but he did a little, yet not so well as he had done, and he was helped up and could sit up a little—not much, but more than he had. Along in July he was able so that we got him out on the steps and let him sit out in a chair some little while at a time. He rode the last of July 2 or 3 times in a buggy around the village. They would have to put him in and take him out. He sat out doors some until the last of August, but he was not improving, and it was too much effort for him to get out and he staid in after that. During the forepart of the summer—and so it was afterwards—he was very fearful of the people touching him, and walking across the floor the jar of the bed at times would hurt him. He was very sensitive to noise, and talking or reading would confuse him. Along the time he had this bad spell I noticed an affection of his speech, though previous to that he had appeared a little silly and talked and laughed, and his neighbors would say: "Why, Henry is getting silly; he is losing his mind." I thought that would wear off and it did. Since that spell he has not been able to read to amount to anything. He has not been able to look at a light all this time—he had to have his light shaded. On a bright day his curtains were nearly down. It is so to this time. He can't speak as easily and readily now as in the summer of 1883, and he loses his ability to pronounce certain letters that he could before. He has remained in about the same condition that he is now for about 6 months. His general health—his digestion—improved.
76 He has digested his food and his appetite has been very fair and he has slept very well. This extreme sensitiveness of the testicle has subsided, but is tender now. He has had headaches every day and sometimes very severe. He complains some of a pain at the base of the brain—of tenderness there. He complains more of that for the last 3 or 4 months than he did before. The spine is very tender and it extends up the back, clear to the neck and head, but after getting above the 10th vertebra it is not so acute. I think he has wasted some in flesh, but his face looks very much as it did. Both legs are somewhat wasted now, but the left one is more. It seems to be better than it was 5 or 6 months after he was injured. His bowels were considerably constipated for the first year; he had a good deal of trouble with them. He has to take an injection now to get them to move. I thought that he was suffering from some contusion, wrench, or concussion that he had received the day previous. The muscles of the side and back seemed to be affected. Since then after a few days it located itself

in the backbone. I don't wish to be understood that it was inflam-ation of the bone, but it was meninges of the back; that is inflam-ation of the membranes that surround the spinal marrow in the back. They are continuations of the membranes of the brain. They have continued to be affected from that time to this.

(Question No. 1 for identification:)

77 Q. Assuming it to be true that the plaintiff was 46 years old October last; that for about 2 years next prior to Dec. 29, 1882, he had been engaged in dealing in stock—buying the same of farmers through the country about his home at Milton, Wisconsin, and taking the same by railway to Milwaukee and Chicago to market; that prior to engaging in this business he was engaged in keeping a store for about 2 years or more and prior to that in school teaching and farming; that prior to Dec. 29th, 1882, his general health was good and his habits were good and he had not had occasion to call a doctor for himself but on 2 occasions, once when he had measles and once when he had colic, the last occasion being 4 or 5 years prior to Dec. 29th, 1882; that he had no weakness except that he was liable to indigestion or colic from overeating or biliousness: that he had never had any scrofulous or other blood taint; that such colds as he has had have been colds in the head and did not effect his lungs or other parts of his body; that he has never had any rheumatic complaint or nervous disease or affection prior to Dec. 29th, 1882; that prior to Dec. 29th, 1882, he was able to do hard work in farming; that on Friday, Dec. 29th, 1882, he was riding in a stock car upon a railway track near Archer Ave., in Chicago; that in so riding he was sitting facing northerly to the rear end of the car, he was in upon a gate or partition crossing the end of said car at about its center—about 12 or 15
78 feet from the rear end of said car; that the front compartment of said car was loaded with hogs and the rear compartment with about 50 sheep, the sheep being quite closely packed; that as he was so riding he saw a train belonging to the defendant backing toward the car in which he was riding upon a connecting track; that he sprang with all his might from the place where he was sitting for a window in the rear end of the car, the bottom of which was about 4 feet from the car floor, and with his left hand caught hold of one of the iron rods with which such window was grated, such rods being placed in said window perpendicularly; that about the same time that he so caught hold of such iron rod some portion of the defendant's train collided with the west side of his car, and he felt the shock, which he describes as a chug, and then another chug, and the sheep came against him each time so that he felt their force the whole length of his body; that they wrenched him and carried him off his feet; that he lost consciousness for a moment, and when his consciousness returned he found himself still clinging to the iron rod with his left hand, but that his feet had been carried from under him and were elevated to near the top of the car at its east side, his feet being higher than his head; that he was lying on his left side and back on the heads of the sheep, and

they were crowding against him; that the car was tipped
79 to the east so that the floor was at an angle of 30 to 45 degrees from a horizontal position; that the sheep were frightened by the escaping steam from the engine and the squealing of the hogs *are* were crowding to the northerly end and east side of said car, piled one upon another, as aforestated, and pressing against the plaintiff'- back with their heads; that one stag sheep, with large horns, was pressing against the plaintiff's back and left side with a good deal of force; that plaintiff worked himself from such position so as to get his feet upon the floor of the car and tried to open the window to escape by pushing the same to the left with his right hand, and in doing so felt a pain in the left side of the small of his back and stopped his effort to open the window; that he tried it again in the same way a moment later, and the same pain recurring again stopped; that he then opened the window, starting the same by prying with his brad- stick and supporting his back with his left hand, and got through the window and to the ground on the east side of the train; that he then felt a tremor or quivering of the flesh; that he was badly frightened; that he felt a sensation of stunning in the head, as though a cloud had passed over him; that he tried with his brad-stick to poke the sheep back as they piled up and felt a recurrence of this pain in the left side of his back; that he walked around the train to the left side of it, and
80 in walking felt no pain ordinarily when supporting the place where the pain occurred with his left hand, except that a jar in walking would cause a recurrence of the pain; that after about an hour or an hour and a half's delay he got upon the engine of his train and it proceeded to the stock yards, a distance of about 2 miles; that in so riding he stepped across upon the tender, took hold of the brake with his left arm, and rested his weight partly upon the edge of a portion of the tank; that in crossing frogs in the track the jar would cause a recurrence of the pain before mentioned, and once upon the occurrence of some jarring, as he was standing, in riding this distance to the stock yards, with his weight upon his feet, he felt sickness at the stomach; that after arriving at the stock yards, and about noon, after some of his stock had been sold, he took figures of the sales and attempted to make reckonings or computations, when his mind would be confused and he would be unable to do so; that upon sitting down a moment he would fall asleep; that he walked from the stock yards to a street car, a distance of about 80 rods, and after leaving the street car, about 2 blocks to the depot of the C., M. & St. Paul R'y Co., where he took a train for home by way of Milwaukee; that twice upon the trip home, while standing upon his feet in the car, he experienced a recurring of the feeling of sickness at his stomach and a recur-
81 rence of the pain upon jarring or jolting of the car while standing; that he arrived at his home, at Milton, Wisconsin, about midnight, and when in bed his wife bathed his left side and back with camphor and applied hot flannels; that after this he soon fell asleep, but woke 2 or 3 times towards morning, feeling a recurrence of the pain in the left side of his back, and his wife again

bathed it, and that he sent for his doctor. Assuming all the aforestated facts to be true, and taking into consideration your own knowledge of the subsequent condition and symptoms of the patient, what, in your judgment, was the origin and cause of the plaintiff's condition at the present time and since Dec. 29th, 1882?

Obj. to as not based on the evidence; objection overruled; exception by defendant.

A. I should think it was inflam-ation resulting from the injury received in the car at the time of the collision—in other words, I should think the injury was the exciting cause of the condition. I don't think he will ever be able to do much physical labor, if any at all. I don't think he could carry on business requiring mental capacity collectedly. It don't look probable that — will soon be able to do so. He is liable to require assistance a good while if he lives. This injury may cause death ultimately.

Cross-ex.:

When I made my diagnosis there seemed to be no indications of a fracture of any of the ribs, or a fracture of the spinal pro-
82 cesses, or a disturbance of the bones, injury to them, and I concluded that it was perhaps confined to the muscles along there. I thought it possibly might be; could not tell; injuries to the spine are very obscure. The injury he claimed to have received was in the region of the spine. I gave him some stimulants and applied warmth to him and kept him in bed. I took it for granted that he was injured, and took that for a basis and started right from that. I now account for all his symptoms and his condition as the result of the injury. At that time all I could discover was a soreness of the muscles. The middle of the next week I found tenderness of the back, over the lower dorsal vertebra, about the 10th or 11th, between them. I determined that he had inflam-ation and injury of the spine within a few days after that. Waterman now has paralysis of both legs. It began in the left leg, about 4 or 5 weeks after he was hurt. Prior to that he had inflam-ation of the membrane of the spine. I think his hands are somewhat affected. I have perhaps treated 20 cases of spinal difficulty in the last 20 years. I don't know of any but this one which were the result of external violence. They are common as the result of constitutional trouble. Spinal difficulty, as the result of external direct personal violence, are not so common as spinal trouble from anæmia. I assumed from the outset that this difficulty was the result of external violence of an external force applied to the
83 body. That is what I had to start from.

Q. Are you acquainted with writers upon this matter—such as Brown-Sequard, Erickson, & others?

A. Yes, sir; somewhat.

Q. Is not substantially this laid down by all the writers, that no physician will accept any statement of outside or external injury as being the cause of a spinal difficulty until all constitutional symptoms and causes shall — been exhausted?

A. If I answered correctly I should say yes and no both. If the individual claims that he is injured in the spine and back and you find he is suffering from some of those things, you will expect you would have to take into account the condition of the individual—his habits, the diathesis of the system, and the different taints it may have—before you can come to an entire understanding of the trouble. You have to take patient's statement with some degree of allowance. You can't rely upon them entirely. I can't see that it is my duty to exclude anything. The plaintiff has no appearance of his system ever being contaminated with rheumatism; never had rheumatism, so far as I know; no indication of tuberculous trouble, and none has developed; no taint of the system that I could see or find out, and none has shown itself since, and I could not lay it to anything but that injury.

Q. Did he tell you he had been up all night riding in a stock car?

84 A. Yes, sir; that it did not seem to have anything to do with it. Inflam-ation of the spinal column in healthy individuals does not come from colds contracted from mere exposure. You may have them from lying on the ground exposed to cold and wet, but dry cold is not apt to produce it. Inflam-ation of the spine from any cause will produce like symptoms, but when I first saw him I would not expect to find tenderness of the muscles of the side and back from inflam-ation of spine produced by a cold. If his trouble had come from cold the tenderness would have occupied a larger space of the spine than the small point. The tenderness of the muscles of the back was about the size of my hand the first morning I was there. Taking the plaintiff's symptoms from the beginning, they are not such as would ordinarily accompany troubles of the spine not caused by injury. You would not have found tenderness of the muscles of the side and back that I spoke of and the tenderness confined to that. You could fully account for his present condition without taking into consideration any injury direct or remote. As the result of the inflam-ation I think the spinal cord is implicated. The tenderness and soreness of the muscles at the side went off in a few days; that was purely local. In a few days after there was pain in the back and has been ever since; it com-

85 menced at one point and went down and then up. You sometimes, as the result of inflam-ation from external injury, get these difficulties of the head and speech, but this is the only such case of which I have any personal knowledge, and I don't remember any other. It was not necessary to account for the effect in plaintiff's case that the injury should have shown abrasion, contusion, swelling, or discoloration; there has been no especial difficulty with the patient's urine during this time. The membrane of his spine is probably somewhat thickened. His condition when I first saw him indicated concussion.

Redirect ex.:

Where a party's whole system is exposed to dry cold without wetting, I would not expect it to manifest itself at first only on one par-

ticular small spot on the left side of his back or that it would be immediately followed by the pain being localized between two certain vertebra of the backbone.

Recross-ex.:

I don't think the plaintiff's condition could be ascribed to such an exposure as that. I am not acquainted with Dr. Gowen's treatise on the diagnosis of the spinal cord; do not know who he is and never heard of him as the most eminent English modern authority on the subject of spinal diseases. I saw a spinal cord a great many years ago. I am not sufficiently familiar with the spinal cord to give you the deviation from a uniform size from the base of
86 the brain to the end of the spinal cord. I do not remember what the pia mater means. I never took the patient's local pulse or his local temperature, and I never took his general temperature during this entire time. The muscles of the bladder are connected and involved with the same set of muscles which I found to be tender on Dec. 30, 1882. I did not apply Brown's atmospheric test in this case; didn't happen to think of it. It is one of the best tests. Brown-Sequard is one of the leading works on paraplegia or paralysis. I have never read it.

Q. If Dr. Towers or any other writer should state, as a rule (reading from book), all signs of organic disease must be searched for and excluded before the presence of the causes of functional disease is admitted as evidence, would you consider that correct?

A. Yes, sir. In this case I found no organic disease, and I came to the conclusion, after some time, that it must be the result of the injury. I found no other reason for it.

Dr. PHILLIP FOX, sworn for pl'ff:

Reside in Madison, and have practiced the medical profession about 22 years. Week before last I examined the plaintiff'- circulation and breathing, his locomotion, and the sensibility of the surface of his body. I found him emaciated very much from what I supposed to be his natural condition. His articulation was very imperfect—seemed to be due to inability to use the tongue—
87 a paralysis of the tongue. His circulation was rapid and very weak or what we know as irritable. At the time I examined him his circulation was 100 to the minute and quite small. He used his arms badly, but better than his legs. They didn't seem to co ordinate. I put a couple of pins into the flesh, & on the left leg there was about 3 inches difference in his ability to locate the pain. The manner in which he got up by sustaining his weight on his hands seemed to indicate a peculiar tenderness of the backbone. Of course, he could not get up to an erect position by himself, and, when up, he didn't seem to be able to bend the legs at the knee joints or at the hip joint; they dragged along the floor. His chest bent forward, and there was a good deal of tenderness of the backbone there. The muscles of the back, when he would make a motion forward or back, didn't seem to act uniformly. His mental faculties seemed to have deteriorated. He seemed to be childish. I determined that

he was suffering from inflam-ation of the membranes of the spinal marrow and, to some extent, the spinal cord itself. I think that the man will die; that he is gradually going down; that he will never be any better.

(Question marked No. 1, in folio 134, see side page 76 of this record, here asked witness, with the following addition:)

That he sent for his doctor, Doctor Borden, who came before breakfast, and made some examination and applied hot irons wrapped in paper; that he found no external appearances of
88 injury, except sensitiveness to touch or pressure at the place of pain mentioned; that his temperature was below the normal condition and he was in a state of depression, apparently suffering from nervous shock; that plaintiff observed a change in gait on Sunday, Dec. 31, in going across the room, in this, that he could not lift his feet well, but dragged or slid them, this impairment of the power of motion being more marked in the left leg than in the right; that on Monday following he walked two or three rods, from his house to his barn, to see a sick horse, walking with the help of a cane and supporting his left side with his hand; that in so doing the same impairment of motion of the legs was observable; that during the first week his head felt a little bad or disturbed—"clouded" once in awhile, as he expressed it; that after the first week he was unable to turn over in bed without assistance; that in order to turn over he had to have his feet lifted; that when raised to a sitting posture at the side of his bed, with his feet off the bed, he could not get his feet on the bed without having them lifted; that he continued to experience pain in his back—a dull, heavy pain—continuously, and at intervals sharp, intense pain, and also felt severe pain in the left testicle and in the legs, more particularly the posterior of the left leg below the knee; that there
89 was also impairment of sensation in the legs—more marked in the left; that his condition grew gradually worse and he was confined to his bed most of the time; that the same symptoms aforementioned were prevalent until about the middle of February, 1883, or a little after, when, as he was sitting bolstered in a chair, he experienced what he says was a peculiar sensation coming over him and thought he was going to die, and was carried to his bed; that he had experienced some feeling of constriction, or girdle sensation, across his bowels, and after this experienced a feeling of constriction across the forehead and pain at the base of the brain; that soon after this his speech was affected and his sensibility to sound became acute, so that reading to him disturbed him, causing a stunning sensation, and he could not tolerate playing on a melodeon; that the sound of a spoon striking a cup seemed like the report of a gun; that there was a sound of roaring in his ears; that jarring by walking across the floor or touching his bed disturbed him; that his sense of taste became affected and all food tasted about the same; that his arms, hands, and more particularly fingers, became very tremulous, but the power of motion not observably impaired; that no changed condition of the urinary organs

has been observable, but he has never been able to have a motion of the bowels without a powerful physic or injection; that in lying down he felt as if there was — knuckle or knob in his backbone, near
90 where he first felt the pain, and the point where this pain, as first felt, was most severe was about one inch to the left of the middle of the back, or from the backbone; that he required a change of position and turning over from three to five times during the night; that since his injury he lies best upon his right side, and never lies upon his back; that since the occasion when he thought he was going to die his sight has been affected so that he has been unable to read; that he could not keep his connection of thought in writing; that his will power has been affected so that he is easily moved to tears; that this condition has continued, without apparent improvement, until within four to six months last past, except that in the summer of 1883, in July and August, they took him out of doors, where he sat on pleasant days in the shade, and was taken in a buggy for short rides on three or four occasions; that within the last four to six months he has improved in the matter of requiring a change of position and turning over at night, and also somewhat in his sense of taste, but the pain about the base of the brain seems worse; other symptoms and conditions and power of motion remain about the same.

Assuming all the aforestated facts to be true, and taking into consideration your own knowledge as to his condition and
91 symptoms, what, in your judgment, was the origin and cause of his condition at the present time and since December 29, 1882?

Objected to as incompetent and immaterial, and upon the further ground that the hypothetical question does not state the evidence correctly which it purports to include in the question, and that it excludes all of the constitutional and idiopathic conditions which should have been included in the question.

Obj. overruled. Exception by defendant.

A. As I understand the question, the man was in a state of health at the time of the accident and from the time the accident occurred to the present time he has not been.

Q. Yes.

A. I should naturally infer that he received an injury which led to the condition which now exists. According to that question, I look at that as the origin and cause of the condition, the injury received at that collision.

Cross-examination:

Q. Assuming that on the 29th day of December, 1882, at the time of the alleged injury, and for all time thereafter, that there was no external evidence of injury, no abrasion, no contusion, no discoloration; that the man who claims that he was injured, at the time stated, that he was not injured; that he was cool and knew how to take care of himself; that he was not assisted by anybody; that he

didn't appear to be excited or have any emotion or passion
92 whatever evident about him for the space of from one to two hours, during which time he was under the surveillance or immediate notice of several persons; and further that he walked round the car with no apparent changed condition in his locomotion that would be observed or was observed by by-standers; that he himself also testifies that he did not discover any change; that his walk, his sight, his speech, his hearing, everything about him was normal; and, in connection with what I have stated, you will please assume that during that night of the 28th and 29th of December, 1882, the winter season—a night which he himself describes as very cold—that he had traveled all night with sheep in an open, slatted car, with no protection from the weather, and had sat upon a fence dividing his hogs from his sheep in the car during that time; and further that the sensation that he first felt was located at some two or three inches to the left of the spinal column; that he went about his business that day, ate his ordinary, accustomed breakfast as to quantity; that he took a drink of whiskey before breakfast, not as a means of recovery, but as an ordinary incident in his life; that after breakfast he smoked and chewed as he ordinarily had in his lifetime, and that upon his arrival at home in the village of Milton, at about 12 o'clock at night following the hour of eight or nine of the morning when these cars came together, that his
93 wife bathed him on his left side; that the physician who was called next morning at about the hour of seven o'clock found no discoloration, no abrasion, no inflam-ation, no swelling, no signs of any external injury or the application of any external force; that after that he gradually gets into the condition that you say you saw him in some ten or twelve days ago, interposing this; that for about the period of four months there was no lingual disturbance; that there was slight, if any, cerebral disturbance; that everything was from the point of the pain downward and not upwards at all, until after several weeks or months had gone by. To what, under such circumstances, would you ordinarily ascribe his condition?

A. I understand from your question that the assumption is that this man was well up to the time he rode that cold night in the stock car.

Q. Oh, yes; an ordinary well person; he was out all night in a cold winter night.

A. That either from exposure or accident or some cause ill health set in within a few hours; is that the right understanding of the question?

Q. Yes; I have given you the physical condition clearly.

A. Yes; I have tried to follow it as well as I could to get the point. Now, if that is the question, I should say if an accident occurred, that it was due to the accident in a great measure; it may be
94 a combination of both. Where a person is exposed to cold and fatigue they get pneumonia or bronchitis or some other inflam-atory trouble ten times where they will get inflam-ation of the cord or its membranes once. That is because bronchitis or pneumonia are ten or a hundred times more prevalent than affections of

the spinal cord. In judging of the cause, I should assign it to the accident in preference to the cold, if I could get other symptoms to cor-oberate. If the symptoms were only those of shock I might not necessarily expect any abrasion of the flesh or anything of that kind; should expect depression, weakness, and exhaustion, but not such necessarily as to render him incapable of walking around. If I knew that a person was in perfect health for four months after an accident occurred I should have some doubts that a collision, by which there was no sign of external injury, could produce an affection of the spinal cord. Cases of that kind are extreme. I have never seen one. I understand that a person can receive concussion from what seems a very trifling cause, but the force has got to be applied to produce concussion. I should think a man jumping from the platform of a car, getting out of the end of it, and jumping down on the ground might receive a sufficient concussion to produce the state that I found this man in. If there was a concussion on the morning of Dec. 29, 1882, I think there should have been
95 some immediate constitutional evidence of it. I would expect the countenance to be pallid. It would depend on the degree of the shock. I should expect a weak pulse, and, perhaps, quickening, and I should expect the respiration to be weaker, perhaps accelerated, a little quicker. I should expect the skin to be cold and, perhaps, bathed in perspiration; and, if the shock was very profound, with nausea or a lack of desire for food—not necessarily a loss of consciousness. If there is a syphilis of rheumatic trouble or other disease, then there will be in the history of the case or accompanying symptoms characteristic signs of those diseases. In the absence of their history or characteristic signs I should say the inflam-ation resulted from injury, and when the inflam-ation is established I don't see how one inflama-tion can give rise to any different signs than any other inflam-ation, though the original causes may be altogether different. The train of symptoms given me in the question propounded by the counsel for the plaintiff are the ordinary train of symptoms which usually accompanies spinal inflam-ation, whether produced by cold or unusual exposure, of fatigue, or any other idiopathic or constitutional cause. The symptoms that exist there to-day are just the same, so far as I know, no matter what they are caused by. I can't tell from the symptoms what caused it. The cause of it depends on the history of it, and there is this about it, that the cause of it will somewhat vary the progress of it. Where there
96 has been a severe external injury and paralysis accompanies or follows, the paralytic symptoms are below the point of injury, and they affect everything that the nerves below that supply. They affect the bladder. If there was paralysis of the other muscles, originating from an injury in the middle of the back, what we call dorsal vertebra, I should expect the bladder to be affected, more or less, in its power to expel the urine. If there was external injury or force or violence in the middle of the back sufficient to produce a paralytical condition, the bladder would be involved. I should expect it would be one of the signs that would fairly be hung

right out. It might escape notice unless put to the test. From what I saw of Waterman, I think he was affected with inflam-ation of the membranes of the spinal cord and of the cord itself. I don't think it is locomotor ataxy.

Redirect ex.:

(Hypothetical question No. 2 for identification.)

If a patient told you or if you knew without his telling you that he had been in a car loaded with sheep and hogs upon a railway, and while sitting on a gate about the middle of that car, facing towards the rear end of it, there was a collision—another car ran into it and tipped it up so that the floor was from 30 to 45 degrees off from the horizontal, towards the east—and that he made a big spring for the rear window and caught hold of the iron rods
97 in it with his left hand, and that as the result of the collision there was a shock and this car-load of sheep came rolling down against him and chugging against him, and it went back a little and then there was another shock, and the sheep came against him the whole length of his body; that they carried his feet out from under him and that they wrenched him; that he lost consciousness for a moment, and on regaining consciousness he found himself on top of the sheep, the sheep all piled on top of each other, with his feet up pretty near the roof of the car, and the sheep pressing against him, being frightened by the escaping steam from the engine and the squealing of the hogs, and possibly jumping against him—possibly merely pressing, piled one on top of another there against his back, sustaining him upon the tops of their heads in that way; that as soon as ever he could get his feet worked down and get them on the floor he tried with his right hand to push the window open, and he found that he had got a pain right here (indicating left side of back) and had to stop; that he tried it again in a moment and found that the pain returned and he had to stop again; that he then went to work and pried the window and got it open and got out of the car; that this pain went along, with nausea, sickness of the stomach following upon any jarring, and the pain continued with a progression of symptoms, first of the pain in there (indicating) and sensitiveness of the muscles, the point
98 of most severe pain being about an inch from the backbone in the first instance, but the pain from soreness of the muscles soon passing off, within a few days, and there being a pain here, right in the backbone itself, at the 10th or 12th dorsal vertebra, sometimes intense and always continuing, and that coming on as it has been detailed to you, would you see anything in the smallness of the force to affect your judgment as to whether that accident caused the condition of things?

Objected to (same obj. as to former hypothetical question); obj. overruled; exception by defendant.

A. If called to a man in 12 or 24 hours after an accident and found him generally depressed, his circulation weak and quick, feel-

ing sick at his stomach, his mind confused, and he should say, "He was thrown so and so and got hurt in the back," I should suppose he had an injury of the nervous system, and possibly the spinal cord, and I should look to that accident as the cause. If he had detailed to me such an experience as you have just briefly related I would see nothing inadequate in it to produce that injury; should think it might do it; that those results might follow. The bladder centers high up in the dorsal vertebra. It depends on the portion of the spine where inflam-ation exists whether the bladder would be affected; if below the center of the bladder supply I should not expect the bladder to be affected.

Q. If the injury or the pain is first more apparently in the
99 muscles in here, near the side of the backbone, on the left side, but after a week perhaps located right in the backbone, in the spinal column, between the lower dorsal and first lumbar vertebra, and there was only partial paralysis of the lower extremities, more marked in the left leg, no apparent paralysis of the muscles of the stomach, would you necessarily expect, with those symptoms, to have much notic-able affection of the bladder?

Obj. to as incompetent; obj. overruled; exception by defendant.

A. If a person receives an injury sufficient to cause paralysis, that it would affect the muscles of the bladder as well as the muscles of the legs, but if there is concussion which leads to prevent the spinal cord from performing its functions—that is, more properly speaking, a weakness than a paralysis, and it is that condition of things by which the function is suspended for the time, and then this weakness may verge upon paralysis; but it is not paralysis that comes from a force sufficient to produce a clot of blood on the spinal cord or to destroy the intensity of it.

Dr. Wm. Fox sworn for plaintiff:

I reside in Milwaukee and have practiced medicine 16 years. A year and a half ago I made an examination of plaintiff. I went there and listened to his history of several months before—his having sustained, as he said, an injury on the cars, followed in some time with symptoms gradually increasing to what I noticed then.

I saw him but a little while. My first impression when I saw
100 him was that he had a fracture of the spinal column from his appearance. He lay in bed apparently in pain, partially on his right side, I think. He could not lie perfectly on his side or his back, could scarcely move himself, and the opening of a door or the touching of his bed or bed-clothes would make him shriek and cause spasms of the muscles not unlike those of strychnine poisoning, and while I was listening to the history, which he himself could not give, but his wife and Dr. Boden did, he had occasion to get up. His wife and those around him helped him to a sitting position on his hands. He could not sit down; that was the symptom that suggested to me that in the injury he might have fractured one of the vertebra or received an injury that caused hemorrhage or an injury to the membrane causing pressure and suggesting the treatment I adopted of

hanging him up and putting on a plaster-of-paris jacket. I was not quite certain about the diagnosis. It was impossible for me to say what caused that condition of things—whether there was hemorrhage not great enough to cause perfect paralysis—it was not complete paralysis, but a great deal of paralysis—whether there was pressure there, whether there had been an injury to the vertebra and a displacement returned again, and whether there had been a resulting inflam-ation from the injury or something else. The prognosis would depend on what that was.

The same question referred to in folio 161 (see side page 96 of this record) here asked the witness, with the following added at the end:

101 Assuming all the facts therein stated to be true, and taking into consideration your own knowledge as to his condition and symptoms, what, in your judgment, was the origin and cause of his condition at the present time and since Dec. 29th, 1882?

Same objection as before; obj. overruled; exception by defendant.

A. It seems to me that the experience of that night was the cause of the condition—the injury received then in the collision.

Cross-examination:

Q. Now, you noticed as that question was read that it left out the whole history of the night's operations and of his exposure, did you not?

A. Yes, sir.

Q. So that when you answer it you only answer it on the basis of the question as it stands?

A. Yes, sir.

Dr. S. MARKS sworn for plaintiff:

I reside in Milwaukee, and have practiced medicine and surgery for 33 years. I saw plaintiff once and made a superficial examination of him. He was very much fatigued, tired, and nervous, and I didn't think it wise to examine him. This was after he had been on the stand here as a witness. I saw him on the witness stand here and how he was raised up, how he supported himself on his hands; have made nothing we could call an examination.

Same hypothetical question as put to Dr. Philip Fox, folio 161 (see side page 96 of this record), was here asked witness. Same objection, ruling, and exception by defendant.

(A.) I should conclude that the injury caused inflam-ation of the spine. Taking the whole history of the case, with no other light, it was the result of injury causing inflam-atory action—injury

102 received in that collision, from what light I have and the history I have of the case.

Cross-ex.:

Constitutional difficulties might produce all of the symptoms recited in the history of plaintiff's case and produce the same condition the plaintiff is in.

Redirect:

When there is reason to believe a patient has any trouble with the spine one of the first things for a physician to do is to inquire into the history of any fall or injury the patient may have received.

Dr. CLARK GAPEN sworn for plaintiff:

Have been a practicing physician 12 or 13 years in Cook County Hospital, Chicago, in the State Insane Asylum at Madison, and in the city of Madison. I know nothing of the plaintiff.

(Hypothetical question, same as put to Dr. P. Fox, folio 161 (see side page 96 of this record), here asked witness, omitting the words "and taking into consideration your own knowledge as to his condition and symptoms.")

(Same obj.; same ruling; ex'n by def't.

A. Taking into consideration the facts as stated in your hypothetical question and basing my opinion upon it, I should most unhesitatingly say that the injury at that time received was the primary cause and led to the subsequent development of disease from which he is now suffering. I don't see that it occurred immediately. There may have been a fracture. I should not be surprised at all
103 to find a fracture of one of the spinal processes or possibly of one of the arches of the vertebra on one side. I don't think, inasmuch as there has been no displacement, that there could have been a fracture of both sides, but I think it entirely possible that there may have been a fracture at that time. Certainly, basing my opinion on that case, I should say there was some laceration of tissues that set up an inf-am-atory action that progressed slowly, which ultimately involved not only the membranes, but the spinal cord itself, and gave rise to the condition which we know as spinal sclerosis. I don't exclude locomotor ataxy—I mean locomotor ataxy and more. In locomotor ataxy the disease is posterior to sclerosis—that is to say, the posterior portions of the spinal cord and back parts of the column are hardened as the results of slow inf-am-atory processes, but in this case I think that that slow inflam-atory process has not only involved the posterior columns, but has invaded the anterior as well, and we have a condition of spinal sclerosis resulting from a slow form of inf-am-atory action, possibly originating from a mere laceration of the ligaments, and there even may have been laceration of some of the bony tissues. I think his progress will be constantly downward and there will be no reversal of the tendencies in this case at all. I think the disease will constantly increase; that this hardening once begun will go on to complete hardening of the spinal cord and result eventually in the absolute paralysis of

those parts below the seat of inflam-atory action. And very
104 frequently these cases develop insanity. I have seen many cases of spinal sclerosis—a number of cases, at least—that went on into insanity—that is, I refer to the ordinary cases of spinal sclerosis; but those of traumatic origin are not so likely, I think, to develop into insanity as if of idiomatic origin—those that spring up of themselves without any inflam-atory action. I think the progress of this case indicates that it is of traumatic origin. I never knew, basing my opinion on the statements here entirely, a case of spinal sclerosis to develop so quickly as this where it was of idiopathic character—that is to say, where it sprung up as the result of exposure to cold or as the result of some cause which we include under the general head of idiopathic conditions. Where it results from traumatism or an injury to the spinal cord the progress of the disease is more rapid, generally the progress of the disease in the first stage in idiopathic cases is from 1 to 10 years—very seldom less than 1, very often 2 or 3. In this case, as I observed the symptoms there, the paralysis of the legs appeared within a few months, and for that reason, I think, it was a traumatism. I don't think it was idiopathic sclerosis, I think it is now sclerosis with meningeal trouble possibly associated with it. I think it is traumatic sclerosis of the spinal cord. By traumatism I mean physical injury, a laceration of the ligaments or a fracture of the boney covering and resulting inflam-atory action
or a contusion or violent blow, causing no actual laceration of
105 tissues, but producing a shaking up, as it were, of the component part of the spinal cord. I don't think there is evidence of concussion in proper sense, but rather of the fracturing of the boney tissues and the resulting inflam-atory action which has lead to this condition of sclerosis.

Cross-ex.:

The rapid progress of the disease in its first stage in this case cannot be accounted for on a constitutional basis. I start from the 29th of Dec., 1882. I base my answer on the hypothetical question. I know nothing of the case except what is contained in that. Where there has been a traumatic injury we generally expect external evidence of it, but don't always find it. In this question I don't see any evidence of concussion in the strict sense—shaking up. I should eliminate the idea of concussion entirely—drop it right out.

Dr. Wm. Fox recalled for further cross-examination.

In this case there is no element of concussion in my judgment.

Redirect ex.:

There must be injury done more than the shaking or concussion if the disease came from the injury in this case. If there should be any tearing or wrench of the nerves which put out between the vertebra, any hemorrhage, even simply of the cord or within the membranes, that might go on and cause an inflam-ation that might cause
a pressure sufficient to account for some of the symptoms, and
106 might produce the result that has occurred in this case. Those

injuries are rare anyway, but that is one of the diseases that would be likely to occur if that was the result—from a twisting up and wrench of the body in an unnatural position by force. The spinal nerves have their roots largely in the spinal column. The nerves injured outside of the spinal column would not be likely to affect the cord.

Plaintiff rests.

Dr. N. SENN swo-n for defendant:

I reside in Milwaukee, and have been a physician and surgeon 17 years. I am teaching surgery in the College of Physicians and Surgeons in Chicago. I am attending surgeon of the Milwaukee Hospital. I made an examination of Waterman this morning and completed it to my satisfaction. I came to the conclusion that he was suffering from locomotor ataxia. It is a disease originating in the nervous centers primarily, usually in the spinal cord, starting in the substance of the cord itself, and consisting of a degeneration or breaking down of the tissues of the substance of the cord, and showing itself to the physician by the most important symptoms—a loss of co-ordination of motion—that is, that the patient cannot control his movements; the movement of the limbs do not respond promptly to his will power. That is one of the earliest manifestations of the disease. While there is yet no paralysis, the case simu-
lates paralysis, because the patient cannot control or put his
107 limbs where he wants them. There is now partial paralysis, but I am speaking of the beginning of the disease. When a patient supposes that he has paralysis, on a closer examination it is found that the supposed paralysis simply consists of a want of co-ordination of movement. He has to concentrate his ideas in order to bring a part where, in a natural state, he could readily place it without difficulty, and that, of course, is the result of the interruption of the currents starting through the spinal column and through the nerves to the distant muscles that are designed to move the limbs.

Q. What symptoms would you expect to find, say, between the 29th day of December, 1882, and the present time, to have occurred to account for his present condition?

A. In typical cases—that is, in the usual form—the first thing the patient complains of is lightning pains—pains in different parts of the body—more especially in the lower extremities; then the first thing he notices is a difficulty in walking. As the disease advances, of course, we get more manifest symptoms. They very often complain of pain in the back and a feeling of tightness across the body. Still later they have cerebral symptoms, brain symptoms, which consist in abnormal sensations in the nerves supplies from the brain.
We have partial paralysis, then, of some nerves, cranial
108 nerves, usually the nerves which supply the eye. The patient cannot see distinctly; very often sees things double; instead of 1 finger he sees 2; at the same time there is a disturbance in the innervation process all over the body. He is very sensitive in all

parts of the body—what we call hyperæsthesia—the least touch will cause pain. Those are the most prominent features, while, of course, gradually there is a loss of general health, an impairment of appetite, disturbance of the alimentary canal. Locomotor ataxia is paralysis or partial paralysis, but is not confined to the lower limbs. It may attack any part of the body, but usually manifests itself primarily or first in the lower extremities. As to the causes of this disease there is a great deal of speculation. Some of us attribute locomotor ataxia to syp-il*l*is, others to excessive venery—excessive sexual intercourse—and so on, so that, so far, we do not attribute it to any particular cause. It consists in breaking down of the nerve power—that is, the tissues that transmit nervous impulses. The particular change consists of an increase of tissue—of the elements of the nerve center—which are normally of not much importance to the detriment of the nerve tissue proper; a hardening process that affects the nerve tissue. While it is at first localized to a certain extent, as time passes it becomes diffused, and, consequently, manifests itself by various symptoms in different parts of the body.

Q. Assume, if you please, that Mr. Waterman was in the city of Chicago, or near the city of Chicago, on the 29th day of De-
109 cember last, and the best way I know of presenting the hypothetical question to you is by taking his testimony and reading it, and you will pay attention to that, if you please. Let me assume in advance that two trains are standing upon parallel tracks, which tracks are seven feet apart; that there is a connecting rail, measuring somewhere about seventy-five feet in length, running from one track to the other through that space of seven feet, so there would be a space of seven feet and an angle of seventy-five feet, making an acute angle; that the engines of the trains of cars on those two tracks are stationary at a point almost directly opposite to one another; that about the same time they both began to move in the same direction, southerly, the one upon the inside track having its engine ahead of its train and the one upon the outside track having its engine backing its train. The one upon the inside track consists of eighteen to twenty cars. The one upon the outside track consists of an engine, the tender, and one coal car. That by some reason, whether by mistake or not makes no difference, the train upon the outside track backs through the connection and comes in contact with the train upon the inside track; that the cars of each train extend over the side beyond the rails about two feet, making, as between the two trains, four feet of the distance of seven feet accounted for, so you can judge about how many feet they would run before they came together; that they are moving about as fast as a man or two
110 men would ordinarily walk; not fast walking or slow walking, but just about middling; I think that is the language of the witnesses; that the tank or tender of the train upon the outside track caught under a stock car—under the beam—the end beam that extends across and extends out beyond the side of the car; that it caught under that and lifted it possibly two or three feet; that in that car was this plaintiff, Mr. Waterman, with sheep and hogs, and that he says: I noticed that engine and car off in this direction (in-

dicating). I noticed it a few minutes before I heard the toots. It seemed to me as though almost instantly with my seeing that engine that she started just as fast as she could, backing towards me. She started backing up towards my car, and I thought they were going to go right through us, and I hollered, and I jumped for the little end window in the rear end of the car. I sprang with my brad-stick. I had my brad-stick in my right hand, and I sprang with all my might, and I grabbed with my left hand the iron rod in the little window, and it seemed that just as I grabbed that that that car struck right against my car. There was a chuck, and it came a little this way again, and then it seemed as though it chucked a little this way again, and then it chucked a little that way again, and then, for a few minutes, I didn't know where I was. It
111 seemed as though it was all done so quick I didn't know where I was for a few minutes. As soon as I recovered I found that I was drawn along. My feet were up, I think, almost at an angle of forty-five degrees right up here (indicating), and I hanging with my left hand to the rod, my feet up that way, and behind me was a lot of sheep crowding against me. They had been, all of them, cuddled up together, and the sheep had carried me right along, I suppose. I lost control of myself probably, and they carried me along with my feet up towards the top of the car and I hanging with my left hand to the window. I tried to regain my feet. I tried to work myself along, get my legs over, and get over the sheep back onto my feet—kind of work myself along. I pulled my feet and worked back, and finally got onto my feet. My sheep were most of them wethers, and they had horns, the most of them; some were small and some were large. I had one what they call a stag sheep, and his horns seemed to be nearly in the center of my back, and seemed to be pressing against me there. The engine kept scaring them. You know how they will take to crowding. He had horns. He had been used as a buck and had large horns. After regaining my feet, I thought I would try and get out of the car. I raised my arms to open the window where I climbed in. I undertook to shove the window up and a sharp pain catched me here (indicating); kind of in my side; a little back of the side; here
112 in my side and here in my back (indicating). Now, the pain seemed to be right in there, a little more towards the backbone; not directly in the side, but about one inch from the backbone. Then in a few minutes, probably a minute, I don't know as it was as long as that, I tried again, and the same little pain catched me there; then I took my brad-stick and pried against the rod in the side of the car and I opened it maybe four inches or six inches; that was my third time of trying; then I kind of pressed my side this way (indicating) with my left hand and got my right hand where I could shove it—"that is, shoving the window, I suppose," and I shoved it back and then I climbed out of the car. I walked right along on the other side and I spoke to the engineer that was pulling our train. My side ached a little and I didn't want to climb up in my car, and I asked him if he would let me ride on his engine to the yard. I kind of turned round and kind of sat

upon the edge of the tender, leaned up, and rode along down to the yard, and one time I was standing right on my feet and we went over some kind of frogs, where they cross, and with the jar I felt just a little sick at the stomach—just a minute a little. I didn't think anything of it. I didn't have any breakfast and I rode all night with the sheep, and I thought I would be all right when I had a little breakfast. I rode on down to the yard. When
113 I was sitting I didn't seem to mind the jar at all. As quick as my cars were clear I started to a hotel and got some breakfast. I got breakfast and went back to the commission men's office. It seemed as though I could not sit down without I should drop right asleep. I said, "This is at the commission men's office;" I said, I guess I will try and see how we stand on the cattle. I took my book out and looked over to see what they had cost me, and some way I could not reckon. I tried to reckon—to run up a column—and I could not reckon, and I said, "I guess I will have to give this up and I will try to get up town." Nothing transpired on the way to Milwaukee, only when we were coming to Western Union junction I stepped out, and when I stood on my feet where they went over one of those places where it jarred a little I felt a little bit sick in my stomach, and so I went right back and sat down in my seat. I didn't seem to feel it so much only when I would stand on my feet; when I was sitting I didn't seem to notice it. I seemed to want to go right to sleep when I would sit down in my seat. When I stood on my feet the pain would be in the left side of my back, and if I put my hand there (indicating) I would not feel it so much—kind of pressing my hand against the back. I reached home about twelve o'clock at night. After I got into bed my wife bathed me and heated a flannel and laid it over there, and in a few minutes I was asleep.
114 I woke up probably two or three times before morning. I didn't know what ailed me. When I was awake I had a pain in my side; probably that is what wakened me. When I awoke I felt pain in the same place. The second time I awoke my wife bathed me again. In the morning I sent for Dr. Borden before breakfast. He examined my side and back and ordered hot cloths and hot griddles. Every day I kept getting a little worse for about seven weeks, I think, and then one night I was bolstered up in my chair, and the doctor had been in a few minutes before, and I felt a peculiar sensation coming over me, and I said, "I guess I am going; help me to bed." I was put in bed. I think it was February 19th that Dr. Palmer came. I didn't hardly know anything afterwards for two or three months from the time of this peculiar feeling, and then I commenced to feel a little better. I have had pains, but never anything like this pain in my back. I have not been free from pain since the 29th day of December, 1882. It is usually a dull, heavy pain; at times very intense and sharp; the intense and sharp pains were very frequent, and it seemed as though I could not stretch myself; it seemed as though I wanted somebody to take hold of me and pull me and stretch me out. I suffered these sharp pains very frequently up to within the

last three or four months; maybe six months. These sharp pains have not been so frequent; but this kind of dull pain remains
115 all the time, and tenderness here (indicating). I have not been able to lie on my back since I was hurt. I lie on the right side or left side. I lie a little better on the right side. I have only laid on my back when the doctors have placed me there for some special examination. Since the time I had the sinking spell until now I have not been able to read—ever since I had that in my head. I can think a little better now than I could some time ago, but I can hardly think to make the connection so well. If I wanted to write anything I could not. I could write two or three words; some days I could write two or three sentences. I could not have anything read to me. I could not let the children play on a melodeon. I could hardly bear to have any one walk across the floor, and could not even have them touch my back. A teaspoon striking against a cup would sound almost like a cannon to me. At times I had terrible headaches and pains, and lately I felt a pain in here (indicating back of head), and then right up here (indicating forehead), and a kind of roaring sound in my ears sometimes. My speech has been affected ever since that night that it went to my head—that I thought I was dying. I can talk better now than I could eight months ago. I have not had a movement of the bowels unaided since I came home from Chicago that morning. I have to take either a powerful dose of physic or an injection. I never
116 had a very strong stomach; had indigestion.

Since Dec. 29th, 1882, I have been annoyed in my bowels. I feel as though they were full of maggots, and there is a kind of writhing all the time, by spells, inside of me, as though it was alive in there moving around all the time, and a twitching of the muscles and flesh. I have not been able to turn over in bed since my injury. Maybe I did two or three times the first week, but after that never. I always have to have my feet lifted upon the side of the bed and have to be pulled off when I want to turn over. Since December 29th, 1882, I feel as though there was a tight band across my bowels and across my forehead. In buying stock and shipping it to Chicago I was more or less exposed to inclement weather. I used to try to protect myself and dress as well as I could to prevent injury from the weather. I never took any extra precaution unless it happened to be a bad morning. I seldom took cold. I sometimes got a little cold in my head, but that is all. I sometimes have a little cold, never on my lungs or any other portion of the body than my head. I never would cough any, or anything like that.

From about midnight I remained in the car with my sheep until we reached Chicago. It was a slatted car. It did not storm during the night. It was clear and cold. When not stirring up the sheep I was sitting on the gate, the division between the hogs and
117 sheep in the car. When the cars came together I lost consciousness. I took hold of the iron rod with my left hand, and I recollect it went chug, and chugged that way a little and chugged again; then I don't recollect after that for a few minutes.

When I got out of the car I don't know as I can tell how my head felt. If there would be any sensation different from usual there would be a little kind of dizziness, like a man who had a kind of a stun. I felt all the time as though a little cloud had passed over me, a kind of stunned sensation. I cannot say and will not say if there was or was not anything unusual about my head then. I walked around as good as usual. My vision seemed to be all right. After I got down on the ground this pain caught me in my side again. If I put my hand there I don't feel hardly any pain. I didn't discover anything or notice anything at that time strange or different about my feet; don't think I did either about the use of my hands and arms and fingers; don't recollect that I felt any sickness of the stomach. I hadn't slept any during the night. After I got out of the car the only thing I recollect particularly was a sort of tremor of the flesh like a tired colt, sometimes one time in one place and then a little in another. I don't recollect any chilliness; there would be just a little twitching; no prickly sensation of the skin nor itching sensation.

In walking around the car at the place where the two trains
118 came together, and while waiting there I felt this pain. I didn't seem to notice it only when I was walking; if I happened to kind of jar a little I would notice it—it would make me have a little pain again. At this time it seems as though all the time I am lying down I am lying against a knuckle or knot in this point all the time (indicating the spinal column). I think that spot is about the ninth or tenth vertebra from the base of the spine; the pain was, maybe, two or three inches from the backbone. I took breakfast about nine and a half or ten o'clock; that would be an hour or half an hour after the trains came together. I ate an ordinary amount of food, nothing unusual. I took a drink of whiskey before breakfast; nothing unusual about that; smoked before breakfast; nothing unusual about that. I think it was a little after three o'clock when I next took food; then took a cup of coffee, two fried cakes, and a piece of cheese. I chewed tobacco and smoked that day. There was no discoloration of my side or back that I know of; there was no breaking of the skin; there was no bruised condition or appearance; there was no swelling at the point of the pain or at any other part of the body. I didn't notice any myself, and my wife did not say it was swollen. After getting out of the car I didn't notice anything particular about my breathing. I think I was pretty badly scared. There never has been anything unusual about my urine since that time. I do not perceive any difference
119 in my hearing. After about seven weeks I noticed that everything seemed to taste about alike to me, and until within about eight months; now my food tastes better. There has been no difference in my sense of smell.

The next Sunday after I was hurt (and the alleged injury was the morning of Friday) I went out into the sitting-room, and I could not seem to lift my feet; I wanted to kind of slide them. I didn't notice it in my right one, but in my left leg the most. I could not lift them very well. There was no jerking or pulling up of the

knee. I didn't notice any changed condition of speech until about the first of March, 1883; it was right along after I had the bad spell. I didn't feel any pain at the back of my neck the day or the day after I was hurt. I did after it went to my head that night (meaning the time when he says he had the bad spell, six or seven weeks after.) I did not observe upon reaching home or before reaching home any tremor of the hands. I don't recollect of any sense of pain except at the point I have described. The knot or knuckle seems to be right on the backbone, as though I was lying against a knob. Upon that testimony, Doctor, upon that state of facts, assuming them to be true, how do you account for his present condition? Assume also that he was a man apparently well, in a fair state of health before that time.

120 A. I don't know what the cause was. I would be unable to state what was the cause of his present condition or to account for the symptoms complained of, except that local trouble he complains of, where he was supposed to be injured, and which I consider, of course, a local trouble, and which in time disappeared, as I understand it. He claims it did not last long. I don't believe that traumatic injury could give rise to such symptoms and such permanent results as we have to-day; that no traumatic injury whatever could give rise to that kind of degeneration or pathological condition I recognize to-day in the plaintiff—I mean injury by violence externally applied and as contradistinguished from a diseased condition independent of injury.

Ques. In case the spinal cord is lacerated or contused as the result of traumatism, what immediate symptoms would you expect?

A. In contusion of the spinal cord I should expect immediate symptoms, of course, below the point of injury—below the point of contusion—by contusion meaning, of course, an amount of injury to the cord sufficient to suspend the function of the cord for the time being. I should expect immediate symptoms in the shape of abnormal sensations or abnormal motion, a diminution of motion, a paralytic condition of either the nerves of sensation or motion. In nerve cases it might suspend the power of walking entirely for the time being. I would not lay too much stress upon the fact that plaintiff was in his business exposed to inclement weather and rode on the night in question in an open car without sleep, inasmuch as

121 this condition is so often produced without any such cause. I think the symptoms described in the testimony correspond with the present condition of the patient and I attribute it to a degeneration, which in almost all cases occurs independent of traumatism—a spontaneous lesion we find in practice. That I consider as constitutional, due to some unknown cause. We only recognize the disease as quite frequent as spontaneous lesion, independent of traumatism. This sensation as of a girdle tied around the body means an irritation in the place corresponding in area with the place in the cord which is the seat of inflam-ation, and it is a frequent symptom of cases of locomotor ataxia as well as inflam-ation of the cord without locomotor ataxia. Cerebral symptom is one of the features of locomotor ataxia. If Waterman has received any fracture

of the vertebra I should expect either the displacement of the broken bone or swelling, the result of hemorrhage at the seat of fracture or as the result of the laceration of the cord itself. If the cord was lacerated of course I should expect immediate symptoms below the point of laceration in the shape of paralysis. There is nothing in the history of this case to indicate in any degree a fracture of the spinal column; there is no deformity; the spine appears to be in a normal condition—the bony portion of it. In case the bones were broken there would be total paralysis of the lower portion of the body. The extent of the paripheral symptoms would depend on the extent of the disease in the cord or the injury. Age has
122 an important bearing in a case of this kind. In all cases of locomotor ataxia that I have seen it affects in preference people of middle age—say people from 35 to 50 years old; that is about the age that is predisposed to this condition. It is exceedingly rare in the young and I have never seen it in the aged.

The fact that a man was apparently in good health up to a given time has no value. I have seen these patients present all evidences of general health when they first commenced to manifest these symptoms. Assuming plaintiff's testimony to be true, and that all of the facts and circumstances stated in connection with the alleged injury are true, I can see no element of concussion as manifested by the symptoms described there.

Cross-examination:

The first I knew of the case was when I came here day before yesterday. We have met with the attorney in his rooms for consultation. The first evening I met Drs. Palmer, Whiting, and Ward an hour and a half or so. It is always well to assist each other. Locomotor ataxy does not originate in inflam-ation—it is more of degeneration. By degeneration I mean condition that may originate independently of symptoms of inflam-ation; we have degeneration as a result of inflam-ation. Inflam-ation is a primary manifestation of a cause beyond our recognition. We must have a cause for the inflam-ation, of course. By the degeneration I have described here this morning I mean a degeneration not attended or proceeded by inflam-ation. If Dr. Palmer found chronic inflam-ation there
123 within seven weeks I will say that that degeneration might give rise to symptoms resembling inflam-ation so closely that authorities might differ on that. I think I have the advantage of the gentlemen who examined the case before, because I see the results now. I have had 20 or 25 cases I called locomotor ataxy—other doctors would sometimes call them locomotor ataxy and sometimes they would not. Assuming that locomotor ataxy might be of traumatic origin, I don't presume that such cases would be differentiated from others because they produce the same pathological condition. I have seen Dr. Ross' late book noted and reviewed. It is a recent work. I have not read it.

Q. Assuming that this author defines locomotor ataxy as a chronic disease characterized by the progressive appolation of the power of co-ordinating the general movements concerned in locomotion

and other voluntary actions, but without distinct loss of muscular power, —.

A. Yes, sir; that is what I have told you. In the beginning the essential element and characteristic of the disease is loss of control of motion without loss of muscular power. If I found that there was not loss of control of motion, but there was loss of muscular power, I would not call it locomotor ataxy. The first objective symptoms are an uncertainty in the gait—a kind of gait that every man who has been drunk has experienced. As applied to the upper extremities it is manifested in this way. If I ask an ataxic patient
124 to touch his nose he will be as likely to touch his forehead or chin; he has power to execute, but not power to control—that is the definitive characteristic.

The bladder is affected in the majority of cases of locomotor ataxy. It is one of the permanent features of the disease. If the plaintiff has locomotive ataxy his present condition would be the same, whatever the exciting cause or origin. I stated distinctly I knew no cause. I don't know the cause. I didn't pretend to know what the cause was in this case.

In what I said as to the best time to judge of a disease I meant to say that the best time to judge of the nature of a disease was when it was fully developed, and did not mean that that was the best time to judge as to the cause of the disease.

Under peculiar conditions apparently slight injuries produce very serious conditions. As regards injuries of obscure nature you cannot prognosticate results on the start. We have to wait for results, and the same amount of injury will not always produce the same lesults. A man may fall upon his knees and no serious result folrow, while another man would have serious inflam-ation of the knee-joint.

Q. As to locomotor ataxy, I find it laid down in Ross' work that emotional disturbances, such as sudden fright, is among the causes. Would you agree with that?

A. I should say yes.

Q. He also says that various traumatic injuries may be the
125 starting point of locomotor ataxy, and instances are recorded in which the disease soon followed a fracture of the thigh, a fall upon the belly, the shock of a gunshot wound, and concussion of the spinal cord?

A. Exactly. I agree with that, certainly. One of the typical symptoms of locomotor ataxy would be affection of the bladder, causing injuries and inconsistence; affection of the occular muscles being one of the symptoms, but not one to look for inception to the disease.

Q. Ross lays it down that the most trustworthy symptoms are the lancinating pains, the feelings of a tight girdle, and paralysis of the occular muscle. Is that right?

A. Yes, sir. The primary state of locomotor ataxy may last from 3 weeks to months. It would be very early for the gait to be affected within two or three days after the supposed cause, but there are cases where in 6 months the disease has fully developed.

Q. Do you agree with Mr. Ross on this, "that the usual development of locomotor ataxy is slow and chronic, extending over months or years?"

A. Exactly; it may be in 6 months, and it may take 20 years. In walking the patient feels as if he were not walking on the floor at all—as if walking down-stairs; they throw themselves flat on the foot—a throwing motion—fearing all the time they are going down; that they are not walking on an even surface, as though they expected to go down-stairs; they get this affection of the gait in the second stage, after getting through the primary stage. The heel is last
126 to leave the ground and first to touch it—a prancing gait, a throwing of the limbs. Convergent strabismus is a typical symptom of locomotor ataxy. They all squint inwardly. By concussion I mean a change in the substance of the spinal cord, as the result of force, transmitted through the walls of the spinal column, producing a wave inside—a shaking of it. It is a condition which gives rise to immediate symptoms—primary results. Unattended by any laceration of tissues pure concussion produced symptoms of short duration, the length of time being in ratio to amount of concussion produced in the cord. Laceration may attend concussion; if so, the symptoms produced by the laceration will remain longer—permanent, perhaps, depending upon extent of laceration.

Q. In treating of concussion of the spine and describing the fourth class of cases mentioned Mr. Ross uses this language: Very slight symptoms at the begin-ing; after a long or a short time, the result is doubtful. These cases are usually caused by railway collisions. The symptoms are generally insignificant immediately after the injury; sensation of having been severely shaken; suffers from momentary weakness and slight confusion of mind, but soon recovers, picks himself up, and walks about. On the next day, or several days, weeks, and even months later, more threatening symptoms set in; pain appears in the back and limbs and gradually increases in intensity; the patient feels feeble—suffers from mental depression; sleeplessness, with a strong tendency to emotional weakness,
127 and cannot attend to business; complains of noises in his ears; there may be slight damage, and on attempting to read the letters become confused. The subsequent course of the disease varies greatly in different cases, but the usual phenomina are the gait is uncertain, straddling, stiff, and dragging, indications of disturbed co-ordination, and the legs become progressively feeble; there is stiffness of the back and of the general attitude; the back is painful when moved, and some of spinal —are tender on pressure; girdle sensation, parassthisia of all sorts, anæsthesia in varying degrees, or pyperæsia, weakness of the bladder, expression of countenance is changed, complexion becomes pale and sallow, marked atrophy occurs in individual muscles, and may in time be extensively distributed; the patient is irritable and timid; suffers from a feeling of constriction of the head, sleeplessness, weakness of memory, impaired power of work; in fact, his whole character has undergone a change.

A. I recognize that, and think it is a very good description; may give rise to a good deal of confusion between the two diseases. It necessitates a search for more positive evidence, especially in the early stage. I think it is perfect—that is, all right. He has borrowed from Erickson. That same thing occurs in a good many authors. One of the first things to be done is to get the history of the case to inquire as to any injury the patient may have received.

Redirect ex.:

128 Q. Where the origin of a disease is obscure and cannot be accounted for on any other hypothesis, isn't it a fact that in cases of that character, if a man has been on a railroad train, a great many medical men swiftly attribute the disease to the fact that he has been on railroads, as the easiest way of accounting for it?

Obj. to as incompetent; obj. sustained; ex'n by defendant.

—. I based my diagnosis, my opinion of this case, on two essential symptoms, and those are symptoms produced by organic change in the brain itself. While in these cases the plaintiff complains of vague pains in the extremities or backache or girdle sensation attributable to temporary changes in the spinal cord, we lack in all of them evidences of central disease in the brain, which is put down by every book-writer pad, particularly so by Ross, as indicating organic disease characterizing locomotor ataxia, and one of those evidences is paralysis of the 6th pair of nerves leading to convergent strabismus—squinting—which I found well marked in this case, a squint which gives rise to double vision; that is one of the symptoms I base my diagnosis on, by looking at the eyes of the patient. I found that the angle of vision was changed; that I had there a convergent strabismus. To prove this fact I asked him to count my fingers. Invariably at a certain distance he saw 2 instead of 1, 8 instead of 4, the crucial test that there was an organic change in the brain which resulted in definite form of paralysis char-
129 acteristic of locomotor ataxia. It is here that we have the advantage of the other colleagues who examined the patient earlier. The next evidence of locomotor ataxia is impairment of speech, always a constant feature of locomotor ataxia, and not mentioned in those instances where the change was simply a temporary one—a change in the nutrition of the brain center; but here there is a permanent change in the brain, evidenced by the paralysis of the muscles which are used in speech. You must all have heard the same thing. It is a change which can be referred back to certain definite locations in the brain itself. We know where the center of speech is now; we know that certain interruptions of the nerve current from the brain to the organs of speech is attributable to organic change or degeneration on the nerves belonging to it. I consequently base my diagnosis on the evidence presented by lesion in the cord combined with the typical change that we find in the majority of cases, as shown by defective connection of the brain. Those symptoms come late in this case, I must admit that, but with those symptoms and with the girdle sensation, with the loss of co-

ordination affecting all the extremities, with impaired vision, impaired speech, the case is one of typical locomotor ataxia. I need no other evidence except to examine the case. That is all.

Recross-ex.:

Inflam-ation of the meninges and the cord caused by external injury sometimes extends upwards until it affects the brain.

130 Dr. J. B. WHITING sworn for defendant:

I reside in Janesville, and am a physician and surgeon. I have been president of the State Medical Society of Wis. I made an examination of the plaintiff this morning which satisfied me. I heard the hypothetical question put to Dr. Senn this morning by counsel for the defense. I have heard the testimony read before this morning, and have carefully noted it. Assuming that testimony to be true, I do not think there is any element of concussion or traumatism in this case. Assuming that the testimony of the plaintiff, as I have heard it read, is true, and from personal examination of him to-day, I am of the opinion that he has degenerative disease of the spinal cord proper, the disease that is ordinarily known as locomotor ataxia.

Cross-examination:

I never saw the patient until this morning.

Q. How much of his spinal cord is involved in this degenerative disease you have mentioned?

A. That question, Mr. Sloan, admits of a good deal of explanation, but you don't want me to do anything but answer the question. You don't mean that I shall answer anything else?

Mr. SLOAN: I am willing you should do *do* anything but preach to this jury.

Mr. FETHERS: I take an exception to that remark.

WITNESS: I judge that this degenerative disease is affecting pretty largely the entire cord and extending to the brain. When a
131 disease of the spinal cord gets to the brain it affects the mind, the speech, and sight. Some spinal diseases originate in so obscure a way that I am not able to tell. Some come from direct violence. Perhaps concussion under certain conditions might produce that degenerative condition of the spinal cord. The ordinary results of wrenches, sprains, bruises of the body, is inflam-ation to a greater or less extent. Inflam-ation of the meninges of the spine may arise from injuries, falls, concussions, anything that does great violence to it—injuries sufficient to incite inflam-ation on the body. I do not know that there has not been inflam-ation of the membranes of the spinal cord of plaintiff. The plaintiff has paralysis, as we ordinarily understand it. He can move his limbs some. In examining the plaintiff he complained of tenderness the whole length of the backbone, and I have no doubt it was sensitive and gave him pain. It was on pressure of the backbone. It indicated

great tenderness. Irregularity of motion in walking manifest- disease of the spine, and sometimes proceeds from inflam-ation of the membrane or of the cord. To differentiate that from the irregularity of gait in locomotor ataxy might be difficult early in the disease; yet peculiarity of gait is characteristic. It is a prominent symptom. I understand that the plaintiff has not walked but very little since his return to his house; that loss of muscular power followed immediately after the injury. I understand that he slides his legs. When we
132 examined him yesterday morning he walked from his bed and chair, and back, four to six feet, supported under the arms of his assistants. I have not an idea that the plaintiff has walked at any time with that peculiar jerking motion characteristic of locomotor ataxy. I don't so understand from the testimony. Inflam-ation of the membranes of the cord, or to a partial extent of the cord itself, I should suppose, might produce the effects upon his walk and locomotion as I testified to here. I found that the patient had a perversion of the vision; that there was a strabismus convergens. It is plain in the look of his eyes; any man who knows what the normal condition of the eye is can tell that by looking at him. One finger was held up before his face and he said he saw two of them; held up 2 and he said he saw 4; held them about 2 feet from his face—think he could see a long distance off better; he did not so uniformly confuse the number as he did when it was within ordinary reading distance. My judgment is that it may not be in every instance that way—not always just the same. I have not seen the intense pain that I should have expected to see with inflam-ation of the spinal cord. A differentiation of the symptoms of locomotor ataxia from those arising from inflam-ation of the membranes of the spinal cord may be rather difficult, but, excluding certain things, I came to a conclusion about it. I believe there would not be such free
133 and easy lateral and autoposterior motion of the spine if he had inflam-ation of the membranes of the spinal cord, as there is now. That assisted me very much in coming to my conclusion. In my opinion, a degenerative disease of the spinal cord caused the present condition of the plaintiff. I don't know what caused degenerative disease. Locomotor ataxy is not commonly produced by traumatism. Mr. Ross' work is a standard work and what he says, "various traumatic injuries may be the starting point of locomotor ataxy," is all right. Any external force that produces injury is traumatic. My idea of a traumatism is where there is evidence that there has been violence done. If there was any evidence in this case that traumatism had been applied to the spinal column, and such traumatism as could produce the injury complained of on this occasion, then I should say that the traumatism, perhaps, was the exciting cause of this condition of the spine; but when there is no evidence produced here that there was any traumatism of the spinal column, then, I say, I do not take that in as an element.

Redirect ex.:

I should suppose there would be a laceration or a contusion or concussion as the result of traumatism. In all that I have heard

from the reading of the testimony of the plaintiff, or anything I have heard in this case, there is no evidence that would lead me to consider that there was a single element of traumatism in
134 this case. The fact that the plaintiff was on the St. Paul train at Brighton Park, in the city of Chicago, on the 29th day of Dec., 1882, and that 7 feet distant, on a parallel track, a Chicago and Alton engine, with tender and coal car, was placed, and the fact that both trains came together, as related to me under the testimony of the plaintiff in this case, in my judgment, is only the old reasoning after the fact, and therefore because of the fact. That is all. To my mind, as a medical man, there is no logic in it. The fact that there is inflam-ation of a particular part, more or less, does not signify that it is the result of traumatic injury. Inflam-ation may result from either traumatism or disease.

Recross-ex.:

I recognize concussion as one character of traumatic injury. I can't get it out of my mind that the two trains moving very slowly, about at the same rate of speed—I can't get it into my head that he could be thrown with great velocity in the shock of two trains coming together with so little force that the impinging upon each other stopped the trains.

Redirect ex.:

I can't get it out of my mind that those trains moving along that way at first—I supposed that those trains struck each other in that way (indicating) and the sheep went from one end to the other just as passenger- would in an accident; but, finally, I found from the testimony that those trains came together at so sharp an angle
135 that they struck each other sideways, and one run under the other and tipped it up a little and it stayed there. That is the testimony, I think; and then I supposed those sheep could not be tilted in this way and that way. Waterman's testimony has been read to me from the stenographer's minutes and I heard most of Dr. Borden's testimony. I think there is no element of concussion in this case. Under the evidence as given in the progress of the trial I think there is an element of traumatism in this case. From his physical condition and my examination of him I should say I find no evidence of traumatism in it. I think he has a diseased condition of the spinal cord or menin*g*les—one or both. I think his disease at the present time could be accounted for more perfectly by the name of locomotor ataxia than any other one name. Sclerosis of the cord is accompanied with locomotor ataxia. Pathological investigation and post-mortem examination have usually determined that where there was locomotor ataxia well marked there was more or less sclerosis of the posterior portion of the cord. In case there was traumatic injury causing laceration or a contused condition of the cord the immediate symptoms would be in proportion to the extent of such injury. You might get a slight injury that would amount to traumatism, and eventually result in permanent disability as being the exciting cause at the same time the disability

might not be immediate or complete. Locomotor ataxia is
136 more frequent from the ages of 30 to 50 years probably that of any other period.

Cross-examination:

Locomotor ataxia does not usually proceed from injury; it does not proceed from injury as much as from other causes. Emotional disturbance, such as sudden fright, may be a cause of locomotor ataxy. Various traumatic injuries may be the starting point of locomotor ataxy and instances are recorded where the disease soon followed fracture of the thigh, a fall upon the belly, a shock of a gunshot wound, and concussion of the spinal cord, but very few authors incline to that opinion and I don't know of any author that applies it to direct injury. And at the end of line four, same folio, insert: Locomotor ataxy is a chronic disease characterized by the progressive abolition of the power of co-ordinating the general movements concerned in locomotion and other voluntary actions, but without distinct loss of muscular power.

It generally begins with a premonitory stage, which may extend over months or years before you get outward manifestation of this want of power to control the movements of the limbs regularly and naturally.

When I first saw Waterman, Feb. 19th, 1883, I found pain and tenderness along the spine and impaired sensation of motion. This was more marked in the left leg below the knee; the symptoms of — were chronic inflam-ation of the cord or its membranes. The
137 causes of locomotor ataxy are so varied that in persons who are predisposed almost anything which presses the nerves or spinal cord will be the exciting cause. I don't know any author that applies it to direct injury. Ross is very good, but there are more modern authors than that.

Redirect ex.:

You may get traumatic injury of the cord by sufficient force applied externally which would not leave any evidence on the surface perceptible to the senses, but not so in concussion. A man gets what we call a shock or very severe jar which produces injury to the spine. I should not expect to find any discoloration or bruises where his back was not touched; that would not be under the head of traumatic injury; it would be concussion. I think you ought to consider that concussion is not traumatic injury. If you strike a magnet a violent blow it loses its magnetism, why you do not know. You cannot detect any physical evidence that there is any traumatism or wound to the magnet, still the force is disturbed just the same as the nervous force in concussion; it is an injury which we cannot define. I do not think it one to which you can apply the term of traumatism. You may get impaired function; it is not what would be termed traumatic injury. If there is concussion which affects the spine it is in that sense the result of injury—the result of that changed condition from concussion. If a man strains or lacerates

one of the members of the spinal cord you would see no evi-
138 dence of traumatism, and of that you hear evidence here be-
fore the jury. I refer to the evidence of crowding and tossing him about there in the car at the time of the collision. On the 20th of April when I saw the patient there was no difficulty with his speech.

Dr. S. B. BUCKMASTER, sworn for def't:

I am superintendent and physician of the State Hospital for the Insane. Since I went to the hospital 6 years ago I have made nervous diseases a specialty. I examined the plaintiff to-day; never saw him before; examined him nearly an hour. He is much exhausted and I did not want to worry him; should like a longer time for examination, but under the circumstances I did not manipulate him any more than I could help on account of his depressed and exhausted condition. Assuming the testimony of the plaintiff in relation to his alleged injury and his physical condition at, before, and after the 29th of Dec., 1882, to be true, and associating with that the result of my personal examination of him to-day, I discover no element of concussion in his case. I did not find any evidences of it. From the amount of injury—the amount of concussion—he must have received, if any, from the collision as described to me, I don't think there is any traumatism. I didn't find any evidence of it. I don't think there was sufficient force to cause traumatism. From my examination of him and the symptoms I discovered and what he detailed to me I think he has locomotor ataxia, or at least a prominence of the symptoms of locomotor ataxia. You will get
some of these symptoms from almost any trouble of the cord,
139 as an inflam-ation of the cord itself or inflam-ation of the
membranes. There are more symptoms of locomotor ataxia than anything else, in my opinion. It would be mere guess-work for me to state the cause of locomotor ataxia properly attributed to or caused by traumatism. I do not recollect any cases of locomotor ataxia caused by traumatism in my reading. I have seen mention of cases of locomotor ataxia caused by traumatism, but not as a frequent cause of it. Sclerosis is one of the features of locomotor ataxia—sclerosis of the posterior columns of the spinal cord.

Cross-ex.:

It may be found independent of locomotor ataxia.

Sclerosis is not characteristic of other affections; occasionally you have it of some of the columns of the spinal cord aside from cases of locomotor ataxia. I have never seen a case from inception through to full development; could have told more about this case if I had seen it from day to day and watched the symptoms as they progressed. What I have meant to say was this: I could not see that the result could follow the injury of the collision, the shock of which was so light as that must have been as it was described to me. I don't think the shock sufficient to produce traumatism. I should not pretend to say that he might not have received such an injury. As I understand, the cars were moving on a parallel track at a slow

rate of speed and the car merely lifted up. I don't know that
140 there was a chug chug. If moving together in similar directions and one lifted the other, I don't see as there could be much concussion. It is a question any one can determine for themselves just as well as a medical man. It does not apply to medicine. Of course, I don't know but the plaintiff received physical injury enough on December 29th, 1882, to cause locomotor ataxy to exist, but I don't think he did. When I examined plaintiff he had a plaster-of-paris jacket on and was so exhausted that I did not like to remove it.

I tested plaintiff's vision to see whether he could tell the right number of articles held up before him, and he could tell whether a thing was double or sing-e. I did not find his vision much affected. Many people can see double by focusing their eyes if they want to. I did not consider that had anything in particular to do with this case, The quivering sensation, as though a cloud had passed over him, felt by the plaintiff as soon as he was out of the car, might have been from fright. I did not see that there was sufficient force to cause concussion which would produce those effects. I doubt whether the plaintiff could have been unconscious for moments or minutes. He may have been unconscious for a little time, perhaps in a dazed condition for an instant. I have read of cases where from nervous shock this condition has taken place and they have lingered awhile and died—in cases where there was more of an injury, more of concussion, than the record shows in this case. In concussion of
141 the spine there are many cases of that kind—concussion from a series of jars, a slipping down several steps. You get those symptoms wherever there is sufficient force to get that amount of concussion.

Dr. A. J. WARD sworn for def't:

I have been a physician and surgeon for 40 years; was surgeon in the Mexican and civil war. I examined the plaintiff yesterday morning and had heard what purported to be plaintiff's testimony read and heard a portion of Dr. Borden's testimony. I don't think from the testimony heard that there was any severe concussion sufficient to produce the disease he is now laboring under. I should say there was no element of traumatism in the case. I think he is suffering from locomotor ataxia.

Cross-ex.:

I have seen 2 cases of locomotor ataxia and 1 very nearly from its incipiency.

FRANK B. TRACY sworn for def't:

I am in the general solicitor's office of the Chicago and Alton R'y. The C. & A. cars pass over the Pan Handle track from Brighton Park by permission. They control their own tracks and when foreign cars come upon their tracks they have to be subject to whatever rules are made by the Pan Handle Co. That was so in Dec., 1882.

Each corporation at the time the cars belonging to another corporation is on its tracks has exclusive control of its own tracks.

PATRICK H. HERRIN sworn for def't:

I reside at Brighton Park, Ills. I am yardmaster for the def't railway and have been for a little over 4 years. I have charge of the handling of freight cars, making up of freight trains
142 going out to different points on the road, and the delivery of freight to different roads and different points in the city of Chicago. I have charge of the trains in that whole neighborhood, including the connecting track between the C. & A. R'y and the Pan Handle road. I was at Brighton Park and recollect the occurrence of the coming together of one of our trains and the St. Paul train on the 29th of Dec., 1882. I was conductor of a train of ice going to the stock yards at the time this affair happened. My train was coming round the Y between our tracks and the Union Stock Yards track with the track of the C. & A. R'y; that Y belongs to the Union Stock Yards and Transit Co., and is the one designated on the map as crossing Archer Ave. to the east. It makes its connection at Archer Ave. with the main tracks of the Union Stock Yards. At that time I was upon the Union Stock Yards track. When we leave our tracks and go upon the tracks of the Pan Handle road we are subject to the orders of the men in charge of those tracks. Our men and trains have to obey their signals when on those tracks. I saw that the St. Paul train and one of our trains had got together; did not see them when they came together; could not see them from where I was. I saw the man that was in charge of the stock standing on the ground. When I first saw him he was looking through the slats at his stock. Somebody asked him if he was hurt and he said no, he was not. The man had a brad-stick in his hand.
143 I think Waterman looks like the man. This was probably ten minutes after the trains came together. I was standing probably 6 feet from Waterman; he did not appear to be excited to me. He stepped upon the car and looked through the slats. I heard him say he was not hurt. I heard him ask if he would be detained very long, and he said he had been in the car nearly all night keeping up his sheep, and that he was anxious to get them to the stock yards. I noticed no disturbance of his face by reason of flush or pallor or anything that attracted my attention as being unusual about him. He was moving around at times and sometimes standing still; in his moving about there was nothing peculiar that attracted my attention at all. I examined the St. Paul car. We are generally called upon for a statement, and it was my duty to examine to make my report. The trucks of the St. Paul car were lifted, I should judge, 6 or 8 inches off the rail; the body of the car was lifted up probably 8 or 10 inches more—just the length of the check chains on the truck; could not go up any farther because the chains held it there. On the east side the wheels did not leave the rails at all. I looked the car over and did not see that it was broken any. I have examined the report of the affairs recorded in our office.

Q. Has any damage ever been charged back to your road by the St. Paul Company, by reason of what occurred there that morning, to your knowledge, with the information you have from the books of the office in your charge?

144 Obj. to as immaterial; obj. sustained; ex'n by defendant.

Q. State whether or not, where damage is done to the car of another company, a report and a claim is made to such other company with the demand for the payment of damages.

(Obj. to; obj. sustained; ex'n by defendant.

The car that I have described the appearance and condition of is the one that had the sheep in when the man with the brad-stick was looking in. I did not see anything wrong with the tank of the St. Paul engine. The car next to the rear of Waterman's car was on the rail. The C. & A. car, loaded with coal, wass off the track. The tank of the C. & A. engine was under the edge of the St. Paul car, under that cross-beam at the end that projects out at the sides, and had lifted it up. (Cut of freight car offered in evidence.)

That is a pretty good cut of a St. Paul stock car. The Alton car was clear of the St. Paul stock car when I saw it, and it wass off the track, and probably thrown clear of the track by striking the St. Paul engine, and then, when the engine that was attached to the coal car came along, not being off the rail, it followed that connection down until it came in contact with the stock car of the St. Paul and ran under the edge of it. The wheels were off the rail. It remained upright, and the coal in it, simply derailed. The stock car of the St. Paul and the C. & A. coal car were clear of each other when I got on the ground. They were not touching each other.

145 The tank of the Alton engine had run under the St. Paul car and thrown it up—the truck about six inches and bottom of car the length of check chains. Ties had been placed under the Milwaukee car on the east side to keep it from tipping over. I suppose I didn't see anything wrong with the sheep in the car; didn't make any general observations; just looked through and saw they were sheep; didn't see any hogs.

The switch-tenders gave signals with the hand—usually the right hand. The arm is raised up and then swung towards the body. Sometimes, when we want switches turned, the engineer will blow the whistle three or four times, whichever the case may be, and they give them signals to come ahead—go down and throw the switches. Sometimes the signal to come forward is given before the switch is turned. We generally rely upon the signals. There is a flag shanty there, near the connection, probably eight or ten feet high. I hardly think a man on an engine upon this outside track, about the northerly point of Archer Ave., could have seen the switch target. The flag shanty would be between the engine and the switch. That switch target was changed last fall.

Cross-ex.:

The C. & A. car was full height and adapted for stock, grain, or

coal. The Alton engine was north of the Alton car. When the switch target stood perpendicularly a train on that west track would run straight down. If the target was turned over to the west it would run off the second west track. I did not see the trains until after they came together. The trucks of the coal car
146 had gone off the track west, the south end about even with the tank of the St. Paul engine. I do not think that the north trucks of the stock car were raised any. I could not say positively. The cab windows and moulding of the St. Paul engine had been injured. I suppose it was the Alton coal car striking the cab of the St. Paul engine that did that injury. It looked as if there were two distinct contacts between the coal car and St. Paul engine and another one between the water tank of defendant's engine and the stock car. I made a report to the defendant company the same afternoon.

Redirect ex.:

I went there to see whether there was anything to report under my instructions and duty. I do not think that the south truck of that stock car could have been lifted up much more than 6 inches without either br-aking the coupling or lifting the tank of the St. Paul engine off the rail.

CHAS. J. LYNCH sworn for def't:

On the 29th of Dec., 1882, I was at Brighton Park as engineer on engine 124 of the C. & A. R'y. The man who tends this track threw the target round for me to go ahead, and it proceeded down to south side of switch "B." The St. Paul train followed me down. The stopped about clear of Archer Ave. A Pan Handle freight train was going towards Chicago. As soon as they went by switch "B" was opened for the connection, and switch "A" was followed the same way for a connection, and I proceeded through this
147 switch and came up here and came to a dead stop. I should judge where I stood on the engine would be 60 feet from this switch "A." There was a tank and car stood behind 12 or 15 feet long. At that time the St. Paul train came down there slow, gradually proceeded along. My engine was headed with north, I on right side of engine, fireman on left. I could not see that switch to see how the rail was, whether it was proper for me to back up, and could not see the switchman or switch-tender, so I said to the fireman, "How is it back there; can you see those plates; is the switch all right?" He put his head out of the cab window and he said, "All right; back up." I started back, supposing, of course, that the switch was shut, up to the main track. I proceeded down here, and finally saw that my car was going through the connection right back where I came. Immediately I reversed my engine as soon as I could tell. It will be some time before a man can tell whether he is going down the main track or through the connection. The car would have to go in there some distance before you could distinguish it, because those rails come together as near as you can get them and then separate a little bit til- you get over. I reversed the

engine and threw her on the forward motion, giving her steam, but the force applied pulled up right up there, and the Milwaukee train going by there at the same time the south end of my car struck the Milwaukee tank and it kind of blocked in there together and pulled me along a little bit til- it finally threw my car off the track. When
148 my car struck the tank of the Milwaukee engine it kind of knocked the car off; this hind part stayed on the rail for the time being; the forward part of the car goes off the track and runs along like that til- the car comes in together in that shape; this end of the car binds up against the end of the St. Paul stock car and raises it up; St. Paul train pulled me along and run my tank under the St. Paul stock car. There is a big beam along in these cars, and that beam caught my tank on the side of the tank and held it right there, and the pressure, this car being off the track and the Milwaukee train pulling me in that way, punched a hole in the side of the tank. If I had had probably 2 feet more room before that car and tank came together, I actually claim that I would have stopped—the cars would not have come together at all. The motion of my train was due to being dragged along by the St. Paul train. There was no shock or bruise or jar that I felt; if there had been I would have had to get off the engine. A man does not care about jumping into danger. When the St. Paul train stopped it stopped me too. I got down on the side of my engine between the side of the stock car and the tank. The St. Paul stock car at the end nearest the St. Paul engine—the truck wheels were raised some 6 or 8 inches from the track and the St. Paul stock car was raised as far as the bearings would let it raise, somewhere near 2 feet from its level position; that includes 6 or 8 inches raise of the wheels
149 from the rails, and the balance would be the natural raise of the car. The north trucks of that stock car were both on the rail, the wheels of that stock car on the east side were on the rail—I mean the length of the car on that side; all the wheels were on the rail except the south 2 wheels on the west side. The point on the tank where this hole was, about 6 inches above the floor of the tank. All the injury to the St. Paul stock car that I could see—and I examined it well, for it is my business to do it in a case of that kind—was a little piece along the side of the car where a knot or bolt had scratched it, not enough to require the car to be sent to the repair shop or to be sent to the Alton Company for damages. There was no damage done to my car. My head was about opposite the north end of the St. Paul stock car when they came together. It might have been 2 or 3 feet from the end. It was a slatted car. After I got off the engine and came back, all I noticed in the car was sheep; they were right in front of me as I looked to the east out of that cab; did not see any person in there. The sheep were not piled on top of each other, to my knowledge. In going onto the Pan Handle tracks we obey the signals of the switch-tender. You have got to do it; if you don't, and he reports you, you may get discharged. At the time my train stood northerly upon the Pan Handle track I should judge the south end of my coal car must have been at least 15 feet, probably more, from switch "A." I had to come to a dead stop.

150 Cross-ex.:

This was the fourth or fifth day the fireman, Martin Williams, had worked with me. Don't know as he has ever worked on the road since. Our own switchmen who accompany trains do not turn switches for us on the Pan Handle track. They have got switch-tenders paid for that purpose. I have been on those tracks 6 years and over. Our switchmen might jump off and turn the switches if they felt like it, but they are not supposed to do it. We usually rely on the man that is paid to do it; the Pan Handle men and we act on their signals.

Redirect ex.:

The switch-tender that is there in charge is supposed to be over the general manager of the road with those signals. Nobody is supposed to give him orders.

ROBERT ALLEN sworn for def't:

I am a switchman of the C. & A. railway at Brighton Park and was on the 29th of Dec., 1882. At the time of this accident I was on my way down toward Ackerman's to turn the switch to let us in on Ackerman's coal yard. I returned to place of accident after it occurred. The C. & A. tank had lifted up the St. Paul stock car about 2 feet on the west side; the biggest part of the lift was nearest the engine. At the front of that car the wheels were lifted probably 10 or 12 inches off the iron. The only breakage I saw was the cab of the St. Paul engine. The moulding was torn off a little. I saw the sheep in the stock car. They were not piled up. The
151 car was not raised high enough to pile them up much. They seemed to be all quiet enough when I got up there; they did not appear to be at all piled up. I did not see any legs sticking out. I saw the man that had charge of the stock. He appeared to be all right then. I did not see anything out of the way with the man. John Miller asked him if he was the man he saw in the car, and he said yes he was; and he asked him if he was hurt, and he said no, he was not hurt. He said, I would like to know when I am going to get away from here. I have been in the car most all night with the stock and they have been getting down on me pretty bad, and I would like to get over and get something to eat and get my stock unloaded. The C. & A. tank was caught in the beams that run across the stock car. The couplings of the car of the St. Paul train and the coupling to the tank of the engine were not broken. I was*h* there when they uncoupled the St. Paul engine from the car. I was there when the C. & A. tank was pulled away. The St. Paul stock car dropped down on the track all right. It was not displaced at all; it went right on the rail.

Cross-ex.:

The coal car was up to the cab of the St. Paul engine—right at the cab window. That is where it stopped to. It was not my place to turn those switches at Archer avenue. We let the switch-tenders on the ground do that for us. That has been our habit. I went

down to turn the Ackerman switch. We have to turn Ackerman's switch. That is a private track and we are supposed to turn it ourselves.

Redirect ex.:

152 Q. Did you, within twenty-four hours after, make a written report to your company?

A. Yes, sir; that is required by the rules when anything of that kind happens.

Q. That every train hand connected with it should make a written report?

A. Yes, sir.

JOHN MILLER sworn for def't:

I was yard conductor of the C. & A. railway at Brighton Park on the 29th of Dec., 1882. I had charge of defendant's train in question. Accident occurred between 8 and 9 in the morning. I rode down on our own train and got off at switch "B." We crossed through there, and I throwed over switch "B" and walked across from my engine to come down, going south to Ackerman switch. I meant to get on there when the engine got along. Our engine passed through the track from switch "B" to switch "A" on Archer Ave.; and when Archer Ave. switch was thrown up I was supposed to get onto her and ride down to Ackerman's switch. We pulled over the switch, and the Milwaukee started up and our engine started to back up so the Milwaukee—the switch was not over yet. We backed over the connection again the same way we came. We slid right alongside the Milwaukee tank and car, and the south end of our car got up alongside the Milwaukee cab. By the time we got there all hands stopped. It was over with, and the cross-beam under the Milwaukee stock car, projecting out about 6 inches, kind of crowed a hole in our tank and let the water out. I saw the plaintiff in that stock car that morning. I was standing on the west side,

153 between switch "B" and switch "A." I could see over top of our tank. I stood west of all the tracks. When I saw Waterman he was on the east side of the car, on the north end, near the corner, standing in an upright position, and had his hands hold of the inside of the car at the slats; stood there upright. I saw him at the time he was going to climb out at the roof of the car, but I did not see him get out at all. He did not make any move while he was in there, and when we got through and slid along the side of the Milwaukee I walked around the other side to look at the car. I saw Waterman on the other side. I said, You are the man I saw in the car? He said, Yes. I said, Are you hurt? He said, No; but when will I get away from here? I paid no attention to it and walked on the other side. Somebody proposed to put a stick against the car to keep it from falling over, but it was unnecessary. He said I have been in the car near- all night and them sheep have been getting down on me, and I want to get over there and get them unloaded. The cars were not broken at all. Waterman was standing upright and had both hands on inside of the car next to the roof.

That was all the time when we were going in there. It was all done in half a minute. That is where I saw Waterman. Before the cars actually came together, as the car was going by, I was waiting for the engine to come down this track so I could get on, and instead of that she went down into the connection. At that time he was standing there at the end of the car. After I got around to
154 the other side of the car I noticed the sheep. They were not piled up any. There were not any of them crowded down in. None were injured, to my knowledge.

The south end trucks ware raised up about 10 or 12 inches; the car and all was crowded over about 18 inches in all. I don't remember whether the wheels of the north end of that stock car were up or not. I don't think they were. On the east side they were all on the rail. As soon as we got that cross-beam out of the hole and got the tank down that car dropped down on the rail—right on the rail, the minute we got that tank away; no machinery used. The Milwaukee train went on about its business. None of the couplings were broken. When we got our tank out of the road they backed up and coupled on again as usual and went on. We stopped there to pull the car on.

Cross-ex.:

I did not know our fireman; the master mechanic hires firemen. At the time I first saw Waterman inside the car I saw him over the tank; it was a low tank and I could see him. Our coal car had gone by; when going by it was so high I could not see Waterman.

Counsel for defendant offered in evidence that portion of the deposition of J. J. Flinn to which his attention was called on cross-examination as follows:

Q. I understand you said he had hold of the inside of the car?

A. He said he intended or was holding on, I could not say which. He made a remark about his being cool and able to take care
155 of himself.

Q. You say he said something about protecting himself from injury?

A. He said if the car went clear over he could have hung on to the car.

Q. If he had, even if the accident had been worse, by doing what he said he would have escaped without injury?

A. If he had done it he would have escaped without injury.

Q. He made no pretense of any injury?

A. Not to me.

Q. Either there or going down to the stock yards?

A. No; and he stood in the doorway going down to the stock yards.

Counsel for defendant offers in evidence the deposition of Martin Williams, as follows:

On Dec. 29th, 1882, I was firing engine 124 for the C. & A. Co. I had been working for the company for 9 days prior to that day,

and had had no experience as fireman of an engine before entering defendant's employment; that was my first trip on the Pan Handle track. On that morning at the time of the accident, after we had backed up to switch "A," I saw the St. Paul train headed south on the inside Pan Handle track and we were on the other Pan Handle track headed north; St. Paul train was headed south towards switch "B." After we had run up to switch "A" I got a signal given me to run up. I gave the signal to the engineer and we backed up into the St. Paul train. The man who gave me the signal was standing near switch A on the outside. The signal was a wave of
156 the hand—the usual signal for backing up. The two Pan Handle tracks are about 8 feet apart. We backed over the connection into the Milwaukee train and tipped one car over with stock and tore the side out of our tender. I could not swear it was our car that tipped it over or our tender; it was tipped to the east. The wheels of the west side of the car were off the track 2 feet, I should think. The two trains came together very easy—no crash or jar. There was no jar whatever, both trains moving very slow. I do not know the name of the man who gave me the signal at switch A. From a man who stood there I learned that he himself had been in the St. Paul stock car. He seemed all right. He said he did not know whether he was going to hell, heaven, or the stock yards. He did not complain of being hurt that I heard. The St. Paul engine, I think, was somewhat scarred up. There was no injury done to the stock car that was lifted up that I know of.

Cross-ex.:

I had never worked at railroading only those nine days and five hours. I was not called upon to make a statement in relation to this accident by any officer of the C. & A.

Q. Do you know whether the conductor was called on for a report?

Obj. to as not responsive.

COURT: It is not a good objection to it that it is not strictly responsive to a question. He may answer it.

Ex'n by def't.

A. I was discharged, and don't know.

157 (The answer to the question read was objected to as incompetent, and counsel for def't moved to strike it out.)

COURT: It is not a good objection to it that it is not strictly responsive to the question. He may answer it.

Ex'n by def't.

WITNESS: When at switch "A" I was on the west side of the engine. The switch target was west of the track. It worked back and forth. When perpendicular, I think, the rails of the cross-over track would be connected and that the rails of the cross-over track — when the target was thrown over to the west. The switch-target standard was about 7 feet long. When I got the signal our engine was north

of the switch; probably the length and a half of a car. The man who gave the signal was not doing anything at the time. The man came round the hind end of the car and gave me the signal to back up. He might have been 10 feet, maybe closer, to the switch track when he gave me the signal. He was on the north of the switch target when he gave me the signal; he must have been 45 feet from the north end of the coal car. He was looking towards me. Didn't hear him say anything. I have not had the experience to understand what the signal for brakes is. I do not know who the man was that gave me the signal. I think he was a middling-sized man and rather a chunky man. At the time we backed up there I do not think there was a man at switch "A" trying to move it. I did not know the fact that our car stood on it so that he could not
158 move it. He, the man, came from behind the car and gave me the signal as he came from behind the car. I had last seen him before his coming out from behind the car as he threw the switch. When we were going north we were in a hurry that morning. We wanted to get off the Pan Handle track.

Counsel for def't also offered in evidence the following portion of the deposition of M. S. Rogers:

Q. Did he give evidence in any manner or form of being excited?
A. No, sir.
Q. Was perfectly cool?
A. I should judge so.

Defendant rests.

MARTIN MURPHY recalled for pl'ff:

I was a Pan Handle switchman, and saw Mann when he was at switch "A."
Q. Did Mann give any signal to the C. & A. engine to back up, that you saw?

Obj. to; obj. overruled; ex'n by def't.

A. No, sir; I did not see him give any signal. He was the one whose business it was to give this engine the signal to back on the right track. It was between them; they took that responsibility to cross there. It was between him and the switchman that was on the train. I did not give any signal. The proper track to go to Ackerman's coal yard was the inside Pan Handle track—the track used by trains going south—and not the outside track, which is used by trains going north into the city.

THOMAS MANN recalled for pl'ff:

I did not give a signal to the C. & A. train to back up. I gave them a signal to stop. I could not give them any signal to
159 back up, for they were not far enough off the switch to back up. They were about half way on the switch and somebody on the engine says, All right, and they commenced to back up on the connection where they came from, and I says, swinging my

hand, "Hold on, or you will go into the Milwaukee," swinging my hand across the track, signifying to stop. They did not go far enough so that I could turn the switch, consequently he backed up and struck the Milwaukee. After I went to switch "A" I did not go to the east side of the Alton train at all. I stood with one hand on the lever and the other on the pin ready to turn it as soon as he would get over. They went partly on switch "A," and I could not turn it with a heavy car of coal on it.

Dr. PHILLIP FOX recalled for pl'ff:

Since I was examined here I have made a further examination of the pl'ff. My opinion remains unchanged. I do not think he has locomotor ataxia. (Witness still has reasons for regarding the case as one of inflam-ation instead of one of locomotor ataxia.) Traumatic injury is given in some of the authorities as one cause of locomotor ataxia. One case of locomotor ataxia that I had the patient gave it in his history that he had caught cold while standing in a ditch that he was digging. In another case I think it was of rheumatic origin. In another case I had it was clearly of syphilitic origin.

These are the only three cases that I have had of locomotor
160 ataxia. They were all of slow development; none of them from external violence. This man has a slight strabismus in looking in certain directions. He can make objects appear single or double at will. I never saw anything of the kind before.

Cross-exam.:

Q. Is this correct from Furtzel's translation of Rosenthal on Nervous Diseases:

"Among the external influences that are injurious to the nervous system we must mention the effects of cold as among the most important. I have *had* several times had cases of ataxia originating from that cause. Among the considerable number of cases I have observed in the Vienna General Hospital, during a long series of years, cold has figured as the most frequent cause, especially in the working classes, in which the men are so frequently and so seriously exposed by their work in the open air or in the water to injuries from cold and from the strong winds which are so prevalent in our climate."

A. I agree with all that.

Q. Now, a little further: "We also find ataxia developed after exposure in different professions. I have seen the first irritative symptoms of ataxia follow exposure among merchants, farmers, hunters, engineers, &c., who were compelled to travel or work in the cold and in snow and rain; among architects, who must also work in water and undergo various hardships, and among laborers
161 who work in canals in ice and at the most inclement seasons of the year."

A. I agree with all that.

Dr. CLARK GAPEN recalled for pl'ff:

I have made an examination of the plaintiff since I was on the

stand. I am more strongly confirmed in my opinion that he is not suffering from locomotor ataxia. My judgment as to the origin of the disease is not changed and I have become more confirmed in my opinion that the origin of the disease was an injury and the character of the disease is inflam-atory. (Witness here testified fully as to the reason for his judgment and as to the symptoms and conditions on which he predicated his opinion.) I think the fact that he can see double or single at will shows the strongest power of co-ordination. I am pension examiner and professor of medical jurisprudence in the State University of Wisconsin. My experience covers hospital experience in a large hospital at Chicago, where we had a large number of cases of locomotor ataxia, and in the Insane Hospital here, where a large number of cases came to my knowledge. I think I have treated not less than 50 or more than 100 cases of locomotor ataxia. I have three such cases now under my care. As pension examiner I have frequently seen cases of locomotor ataxia that have resulted from army experiences, such as injury and exposure.

Testimony closed.

162 And thereupon the defendant, by its counsel, requested the court to give as instructions in charging the jury a series of fifteen written instructions numbered from 1 to 15, both inclusive, prepared and submitted to the court by defendant's counsel, among which were the following, viz:

3. You are instructed that to entitle the plaintiff to recover in this case the damages claimed must be the direct consequences of the act complained of. The relation of cause and effect must be clearly shown to exist between the act complained of and the injury, and this relation of cause and effect cannot be made out by charging such cause and effect as the illegal acts of a third person.

4. The damages to be recovered must be the natural and proximate consequence of the act complained of—that is, a direct injury to the plaintiff's person by reason of the coming together of the defendant's train with the car upon which the plaintiff was riding; and therefore if you find that a new force or power has intervened or that the exposure to which the plaintiff had voluntarily subjected himself by riding during the night in an open car are either or all of them sufficient to stand as the cause of the plaintiff's physical condition, then, in that event, the coming together of the trains must be considered as too remote, and you must find for the defendant.

5. In determining any of the questions of fact presented in this case the jury must be governed solely by the evidence introduced before them, and you have no right to allow sympathy or
163 prejudice or conjecture or speculation to control your verdict.

6. You are instructed that it is necessary in this case that the plaintiff shall establish each and every proposition upon which he relies by a clear preponderance of the testimony; therefore if you find upon any material proposition that the evidence is evenly

balanced or its weight is in favor of the defendant, then, in either event, your verdict must be for the defendant.

7. If you find from the evidence that the defendant's train was lawfully on the tracks in question, commonly known as the Pan Handle tracks, and that its agents or servants in charge thereof obeyed the signals given to the defendant's train, then your verdict must be for the defendant, notwithstanding you may further find that such signal was erroneously given and by a person not in the employ and acting under the orders of the owners of the said Pan Handle tracks.

8. The proper place for any person riding as a passenger upon freight trains is in the caboose of such train, and it is negligence upon the part of such passenger to be riding in a stock car; it was therefore negligence on the part of the plaintiff in this case to be riding in the car with his sheep at the time and place in question. If, therefore, you shall find that such negligence on his part contributed to produce the plaintiff's condition, which would have been avoided by the exercise of ordinary care on his part, then, in
164 that event, your verdict must be for the defendant.

9. The defendant was lawfully upon the tracks in question and while there was under the absolute control and direction of the servant or servants of the so-called Pan Handle Company and was bound to obey their directions or signals, so that if any injury was done to the plaintiff by reason of any mistake on the part of the servant of the said Pan Handle Company, unless the defendant's agents and servants willfully and maliciously obeyed such signal or direction, knowing at the time that it had been given by mistake, your verdict must be for the defendant.

10. It appears by the evidence that the witness Mann had no duty to discharge at switches "A" and "B," and that his assuming to discharge the duties of the regular switch-tender at those points was unauthorized; and if you further find from the evidence that the neglect on the part of Murphy, the agent and employé of the Pan Handle Company, to attend to his duties in relation thereto was the cause of or in any way contributed to the coming together of the two trains in question, then in that event the plaintiff must look to the said Pan Handle Company for redress and your verdict here must be for the defendant.

11. I charge you as a matter of law that the plaintiff in this case must prove negligence against the defendant, and that no presumption of negligence rises against the defendant, even though you should find as a fact that the plaintiff was injured at the time and place in question.

165 12. Should you find that the plaintiff was injured at the time and place in question I charge you as a matter of law that such injury must have been occasioned solely by the neglect of the defendant.

13. A party suing for an injury received can only recover such damages as flow from and are the immediate result thereof. Damages produced by other agencies immediately or more remotely connected with those causing the injury cannot be awarded as proximate or proper compensation.

14. The law ordinarily looks only to the proximate cause of an injury in holding the wrongdoer liable to an action, and if the damage alleged by the plaintiff to have been done to him by the defendant in this action is not the probable consequence of the alleged wrongful act it is not then the proximate cause so as to make the defendant liable.

15. If you find from the evidence any cause or causes sufficient to stand as the cause of the plaintiff's misfortune, other than the one he complains of, then your verdict must be for the defendant.

Counsel thereupon addressed the court and jury. During the progress of his argument to the jury Mr. Sloan, one of the attorneys for the plaintiff, said to the jury as follows:

"When a railroad company goes into a litigation against a man they never stop that litigation until the last hour to which the case can be taken is reached."

166 (To which statement to the jury as aforesaid the counsel for the defendant duly excepted.)

Mr. Sloan, continuing, said:

"I think it is a matter of general experience and knowledge. Of course, I can argue that and infer it, gentlemen, from the fact that the income yearly of such a road as the Alton road, as everybody knows it to be, is millions of dollars, not hundreds and not thousands, as an individual, and when we get a verdict here poor Waterman has this long road to travel. The case has been taken from the State court and brought into this United States court, and he has this long and expensive road to travel to Washington to the Supreme Court of the United States, where cases are hung up four years before determination."

(To which statement to the jury the defendant's counsel duly excepted.)

Mr. Sloan also said to the jury:

"Then about seeing double. Could he tell whether a thing was double or single? I think it will not be improper for me to explain how that occurred. If Mr. Fethers does not object I will say that when these physicians were there we meant to have proved it. Dr. Senn asked: 'Does he see double?' Dr. Borden replied, 'No.' Waterman spoke up and said, 'Yes; I can see double.'"

Obj. to.

Mr. SLOAN: I said it was improper, and the only thing I did it for was to relieve Dr. Senn.

Mr. FETHERS: I wish an exception.

167 COURT: I think there ought not to be statements of that kind.

Mr. SLOAN: "Certainly; but I think it is just to Dr. Senn to state it."

Mr. Sloan further said to the jury:

"This defendant is a railroad, but you have no right and I am the last man to ask you to give a dollar to the plaintiff that you would not give if the defendant was an individual with as ample means. There is this satisfaction of knowing that, take a great and prosperous railroad company, like the Chicago & Alton, with its 850 miles of railroad, its income of millions of dollars, that $50,000 is no more than $500 to a man of a fortune of $100,000."

(To which statement to the jury counsel for the def't duly excepted.)

Mr. Sloan further said to the jury:

"Now, I think you should give such a sum that when all the expenses of the litigation are deducted it will leave to Waterman such a sum as will raise himself and family during the remainder of the years of his life above want."

(To which statement to the jury the defendant's counsel duly excepted.)

Mr. Sloan further said to the jury:

"Will you give such a sum that when the expenses of this litigation and of the coming litigation, when this case travels to Washington, in the Supreme Court, will — give poor Waterman nothing?"

(To which statement to the jury defendant's counsel duly excepted.)

And thereupon, after the addresses of counsel to the jury,
168 the court charged the jury, among other things, as follows:

"GENTLEMEN: I will give you these special instructions at the instance of the defendant's counsel in the case."

(And thereupon the court read to the jury as a part of such charge all of the said fifteen instructions, except those numbered eight (8) to ten (10), respectively.)

And thereupon the court further charged as follows:

"The material questions for consideration and determination by the jury will be whether the defendant company is properly responsible for the collision between the two trains—that is, whether the collision was caused by the negligence or want of proper care on the part of the employé or employés of the defendant company; and, if so, whether the diseased and disabled condition of the plaintiff subsequent to the collision was the result of the collision.

It appears from the evidence that both the defendant company and the Chicago, Milwaukee & St. Paul R. R. Co., at the place of the collision, were and for several years had been using by arrangement the tracks of the Pittsburgh, Cincinnati & St. Louis R. R. Co., spoken of in the evidence as the Pan Handle Company. The train of the Milwaukee & St. Paul Company was a stock train engaged in the transportation of cattle, hogs, and sheep from the lines of its

own railroad, running from Wisconsin into Chicago, to the
169 stock yards situated on the south side of the city of Chicago, and in order to get to those stock yards that company was running the train in question over the outgoing Pan Handle track, connecting with certain tracks belonging to the stock yards company to the stock yards; that the plaintiff had in this train a car loaded with his own sheep and hogs which he had shipped at Milton Junction, in Wisconsin, to take to the stock yards south of the city, and that at the time of the collision he was riding in the car containing said stock looking after and taking care of them. [The evidence all tends to show, and I believe there is no contention to the contrary, that the train on which the plaintiff was riding had a right to be where it was, and, so far as appears, the plaintiff also had a right to be where he was upon that train; at least I see no evidence tending to show that he had not.]"

Exception to this portion in brackets filed by defendant's counsel after motion for new trial was overruled and judgment entered.

"The C. & A. Co., this defendant, also had a right to use the track of the Pan Handle road at this place in the city. It was engaged at the time in running a train consisting of a locomotive engine, tank, and one car loaded with coal thereto attached, which it was taking to a point called Ackerman's coal yard, a little further south in the city, and connecting by switches and side tracks with the tracks of the Pan Handle road, which the defendant was using at the time of the collision, and which it appears they had been
170 accustomed to use for a considerable time and which they had a right to use.

The defendant's train, as appears from the evidence, had, a few moments before the collision, came up from the south over the track on which the C., M. & St. Paul train was upon going south, and had just left that track and passed upon a switch track upon the west side and leading from the track on which they had been over to another and parallel track, belonging also to the Pan Handle Co., situate about 7 feet to the west, and which was the main incoming track of the Pan Handle road.

The evidence tends to show that this switch track, leading from the main outgoing to the main incoming track, was about 60 or 75 feet long, or about the length of two or two and a half rails. The defendant's train, in obedience to a signal from the switchman, left the main track and passed upon the switch track, to allow the C., M. & St. Paul train to go south upon the main outgoing track, and then stopped. Whether they passed wholly over the switch track and stopped upon the parallel main track, or were partly on such switch track when the train stopped, is a disputed fact, but it is not disputed that when the train had come to a full stop, or very soon afterward, it started back over the same switch track and proceeded thereon until it struck the Chicago, Milwaukee & St. Paul Co.'s train, which had just come to that point and was in slow motion, moving
171 on the main outgoing track south. This is the way the evidence agrees the collision occurred. The point of contention between the parties begins when we come to consider the question

of the responsibility for the backing of def't's train into the car of the C., M. & St. P. train, in which the plaintiff was riding, the plaintiff contending that it was owing to the fault and negligence of the defendant's employee, and, namely, the fireman upon defendant's train. The plaintiff's evidence tends to show that the defendant's train stopped with the back end of the coal car resting upon the switch track in such a way that the switch could not be turned so as to enable defendant's train to go south over the west main parallel track toward the coal yard, where it desired to go, and that its train backed down over the switch track and against the C., M. & St. P. train, without orders to do so from the men in charge of the switch, and against the signal of the switchman to stop or go the other way. The defendant's evidence tends to show that the switchman, the witness Mann, signalled the men in charge of defendant's train to back to the south, as though the switch had been turned to enable the train to pass southwardly on the main track, and that, in obedience to such signal, the fireman notified the engineer that the track was clear and to back to the south, and that the train was backed over the switch track into the other train in obedience to such signal. This question, which presents one of the main
172 disputed points in the case, must be determined by the jury from the weight of evidence in the case, the burden of proof being upon the plaintiff.

It will be for you to determine who was properly responsible for the act. No doubt if, as the witness Mann, the switchman, testifies, the defendant's train was stopped while it rested partly upon the switch track connecting the two main tracks in such a way as to prevent the switchman from turning the switch so as to enable the defendant's train to go south upon the west parallel track, and the engineer or conductor negligently, or in obedience to the negligent conduct of the fireman, caused the train to back up over such switch track and collide with the C. & M. train, without any orders from the switchman Mann or Murphy or either of them to that effect or against a contrary order to stop or go the other way, that would seem to fix the responsibility for the collision upon the defendant company, and if you should find such to be fact from the evidence, and that the defendant was guilty of negligence in so running its train against the car in which the plaintiff was riding at the time and place in question, and that by reason thereof the plaintiff was injured without fault or negligence on his part contributing to the injury, the plaintiff would be entitled to recover such
173 damages as will, in your judgment, be a just and reasonable compensation for the pecuniary loss he has sustained by reason of the injury and for the bodily and mental pain and suffering he has sustained and will sustain by reason of such injury.

On the contrary, if you shall find from the evidence that the defendant company was guilty of no negligence which caused the injury to the plaintiff, no matter what the plaintiff's condition may be, the plaintiff cannot recover, and your verdict in such case should be for the defendant; and so, also, the plaintiff cannot recover if you find that he was himself guilty of negligence which produced

or contributed to produce the injury. If you find for the defendant upon the question of negligence, that will end your inquiries, and it will be unnecessary for you to consider or determine the other question as to whether the plaintiff was injured by the collision. Your verdict in that case will be for the defendant. But if you find for the plaintiff on that issue, it will then be necessary to consider and determine whether or not the plaintiff was injured as a direct consequence of the collision; for if he was not so injured he has no footing in court and will not be entitled to recover, notwithstanding you may find that the collision was caused by the defendant's negligence. The burden of proving this issue is also upon the plaintiff who makes the allegation, and you will determine the fact from the weight of the evidence taken altogether. [That the plaintiff's present
174 bodily condition is a diseased and abnormal one in a marked degree all the evidence on both sides abundantly shows. The evidence is also agreed that he is now and for some time has been suffering from disease of the spine, either of the marrow or substance of the spinal chord itself or of the membranes, integuments, surroundings thereof, or both or all of these.

The physicians also pretty generally agree that the disease may be incurable, and that the plaintiff will never fully recover from it. Where they do not agree is upon the proper diagnosis of the disease and as to its cause, and particularly whether it was the result of the railway collision on the morning of December 29th, 1882. The plaintiff's evidence tends to show that previous to this accident the plaintiff was generally well and in good health and capable of attending to his daily business; that immediately after this accident he began having pains in his side and back, and became rapidly helpless and unable to do business; that he gradually lost the accustomed use of his lower extremities and has from that time to this been mainly confined to his room or bed requiring constant care, nursing, and attendance. If the jury should find these facts to be true from the evidence, they should be considered and given due and proper weight as tending to show that he received an injury from the collision which is the cause of his diseased and disabled condition, but of course the jury should guard against com-
175 ing to a too hasty conclusion from this evidence that the collision and the plaintiff's immediate subsequent ailment stand to each other in the relation of cause and effect, because it is easy to see that they may be mere coincidences in point of time and have no other relation. There can be no doubt that the bearing of this evidence is in the plaintiff's favor, and is to be considered in connection with all the other testimony, including that of the medical experts, and given such weight as you think it, upon the whole, reasonably and fairly entitled to]. .

(Exception to this portion in brackets, filed by defendant's counsel after motion for new trial, was overruled and judgment entered.)

A large number of medical witnesses have been examined on both sides. The tendency of the testimony of those testifying for the defendant is to prove that the plaintiff is suffering from a

diseased and degenerated condition of the spine, known as locomotor a-xia, and that this disease in the plaintiff's case was not caused by any shock, concussion, jar, or wrenching produced by the collision or any external violence, but was caused by exposure to cold, dampness, or some cause or causes other than external violence, and which are unknown to the defendant's witnesses, and they have given you their reasons for so thinking. On the contrary, the testimony of the physicians on the plaintiff's part is d-rected to show and tends to show that the plaintiff has not
176 the disease known as locomotor ataxy, and that his diseased and abnormal condition was caused by an injury to the spine or some of its integuments or surroundings, caused by the collision in question, inducing inflam-ation and a changed condition of the parts, and they have given you their reasons for this belief and opinion. You will take the testimony of these medical experts, consider and weigh it carefully in connection with the other testimony in the case, and see what weight ought in fairness to be given to it. They have given you their opinions, their reasons for these opinions, and their knowledge on the subject. It will remain for you to determine the fact as you believe it to be from all the evidence. Locomotor ataxy, the evidence tends to show, is a disease of the spinal chord characterized by a peculiar unsteadiness in the performance of voluntary movements or a loss to a greater or less extent of the power to control and co-ordinate the action of the muscles necessary for the steady performance of those movements without loss of muscular power, and that it may be caused by cold, wet, excessive fatigue, or other things which seriously depress the nervous force, but is more frequently caused by a prolonged exposure to wet and cold. The medical witnesses in general, I believe, testify that it may also in some cases be caused by external violence or injury; but the defendant's testimony tends to show that it is only in rare and exceptional
177 cases that it is so caused, so that the bearing of the defendant's testimony directed to prove that the *defendant* is suffering from locomotor ataxy is to show that the plaintiff was not injured by the collision; and so it should be considered by the jury and given its due weight. If he was in fact so injured and such injury is the cause of the disease he suffers from, it will be perhaps of no great moment to determine what the proper diagnosis of the case may be.

[I wish to add that it is perfectly evident from the nature of the case and the injury that the damages which the plaintiff will be entitled to recover, if you find a verdict for him, will be to a certain extent in the discretion of the jury or in the sound judgment of the jury from the testimony. It should be commensurate as nearly as may be with the nature and extent of the injury and the pecuniary loss which the plaintiff has sustained and will sustain as a direct consequence of it and the pain and suffering and anguish, bodily and mental, which he has and will sustain as a direct consequence of the injury. Of course, the jury will see that in one sense money can never compensate, however great your verdict might be, for an injury of this kind. There is no man in his senses who

would be put in the condition which the plaintiff is evidently in for money at all. In this case the plaintiff can never be
178 compensated, but so far as he can be compensated in that way the verdict should be fairly commensurate with the nature and extent of the injury.]

(Exception to this portion in brackets, filed by defendant's counsel after motion for new trial, was overruled and judgment entered.)

And yet I feel as though I ought to caution the jury against giving too large a measure of damages to the plaintiff; that you ought to be governed by the evidence, and not allow your sympathies for the plaintiff or his family to induce you to give an excessive verdict. Your verdict, while it should be commensurate with the injury, should not be excessive. It should be reasonable in amount.

And thereupon, immediately after the giving of such charge and on the 12th day of January, A. D. 1886, the jury retired to consider of their verdict, and afterwards upon the same day returned and rendered a verdict in favor of the plaintiff, assessing his damages at the sum of $22,000.00.

And thereupon, immediately after the rendering of such verdict, the defendant, by its counsel, moved to set aside said verdict and for a new trial upon the minutes of the court, and upon the further ground that the damages were excessive; which motion was then and there overruled, and the defendant, by its counsel, excepted.

Whereupon, on motion of the plaintiff's counsel, the court
179 ordered and directed the entry of judgment upon such verdict in favor of the plaintiff; and, on motion of defendant's counsel, a stay of proceedings for sixty days was granted by the court in which to make a bill of exceptions.

And afterwards, to wit, on the 12th day of January, A. D. 1886, and at the same term of court, the defendant, by its counsel, excepted to the rulings and decisions of said court in refusing to give the said instruction number eight (8) so requested by defendant's counsel, and also excepted to said ruling and decision of said court in refusing to give said instruction number ten (10) as requested by defendant's counsel, and also filed separate exceptions to each of those portions of the general charge of the court to the jury hereinbefore recited which are enclosed in brackets.

And because the said matters of evidence and the said rulings of the court and the instructions to the jury and the said exceptions and other matters aforesaid do not appear of record in this cause, therefore, on prayer of the defendant, The Chicago and Alton Railway Company, I, Romanzo Bunn, judge as aforesaid, before whom said action was tried, have signed and sealed this bill of exceptions this 20th day of September, A. D. 1886.

R. BUNN, *Judge.* [SEAL.]

(Indorsed:) Filed September 20th, 1886, by stipulation & consent as of January 12, 1886. F. M. Stewart, clerk.

180 The said stipulations relating to settling bill of exceptions in within-entitled cause are on file and are as follows, to wit:

Circuit Court of the United States, Western District of Wisconsin.

HENRY H. WATERMAN
vs.
THE CHICAGO & ALTON RAILROAD COMPANY.

It is hereby stipulated and agreed that the defendant above named shall have until the 12th day of April, 1886, in which to prepare and serve its proposed bill of exceptions in the above-entitled action, and the plaintiff will not in the meantime issue execution.

Dated March 6, 1886.

WM. RUGER,
Plaintiff's Att'y.

(Indorsed:) Filed March 6, 1886. F. M. Stewart, clerk.

Title.

It is hereby stipulated and agreed on the part of the above-named plaintiff, by his attorney, that the time be extended to May 15th, 1886, for the above-named defendant to serve its proposed bill of exceptions in this action.

Dated April 14th, 1886.

WM. RUGER,
Attorney for Pl'ff.

Indorsed: Filed April 15th, 1886. F. M. Stewart, cl'k.

Title.

It is hereby stipulated and agreed that the time within which the above-named defendant shall serve its proposed bill of exceptions may be extended to the 15th day of June, 1886.

181 Dated May 10, 1886.

WM. RUGER,
Pl'ff's Att'y.

(Indorsed:) Filed May 11th, 1886. F. M. Stewart, clerk.

Title.

The above-named plaintiff, by his attorney, hereby consents that the time to prepare and serve a proposed bill of exceptions in the above-entitled action may be extended to July first, 1886.

Dated June 9th, 1886.

WM. RUGER,
Plaintiff's Att'y.

(Indorsed:) Filed June 10th, 1886. F. M. Stewart, clerk.

Title.

The attorney for the above-named plaintiff hereby agrees to an extension of time to settle the bill of exceptions in this matter to July 19th, 1886.

Dated June 22, 1886.

WM. RUGER,
Pl'ff's Att'y.

Title.

The plaintiff may have until the 20th day of August, A. D. 1886, to prepare and serve amendments to the defendant's proposed bill of exceptions in the above-entitled action.

Dated July 20, A. D. 1886.

FETHERS, JEFFRIES, SMITH,
Def't's Attorneys.

Time extended on the above to Sept. 6th, 1886.

Aug. 18, 1886.

FETHERS, JEFFRIES & SMITH,
Def't's Att'ys.

182 Title.

The plaintiff may have until the 10th day of September, A. D. 1886, to prepare and serve amendments to the defendant's proposed bill of exceptions in the above-entitled action.

Dated September 4th, 1886.

FETHERS, JEFFRIES & SMITH,
Att'ys for Def't.

(Indorsed:) Filed Sept. 6th, 1886. F. M. Stewart, clerk.

Title.

It is hereby stipulated and agreed by and between the attorney of the respective parties that the time for settling and signing the bill of exceptions in the above-entitled action be, and the same hereby is, extended to the 20th day of September, A. D. 1886.

WM. RUGER,
Att'y for Def't in Error.
FETHERS, JEFFRIES & SMITH,
Attorneys for Pl'ff in Error.

(Indorsed:) Filed September 8th, 1886. F. M. Stewart, cl'k.

183 On this, to wit, the 27th day of March, A. D. 1886, said defendant, by its attorneys, filed in said court its bond on writ of error; which said bond is in the words and figures following, to wit:

Supreme Court of the United States.

HENRY H. WATERMAN

vs.

THE CHICAGO AND ALTON RAILWAY COMPANY.

Know all men by these presents that we, The Chicago and Alton Railway Company, as principal, and T. B. Blackstone, of the county of Cook and State of Illinois, and John B. Drake, of the county of Cook and State of Illinois, as sureties, are held and firmly bound unto Henry H. Waterman, of the village of Milton, county of Rock and State of Wisconsin, in the sum of forty-five thousand ($45,000) dollars, to be paid to the said Henry H. Waterman, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 23d day of March, A. D. 1886.

Whereas the above-named The Chicago and Alton Railway Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the western district of Wisconsin:

184 Now, therefore, the condition of this obligation is such that if the above-named The Chicago and Alton Railway Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue

Sealed and delivered this 23 day of March, A. D. 1886.

THE CHICAGO & ALTON RAILROAD COMPANY, [SEAL.]
By T. B. BLACKSTONE, *Pres't.* [SEAL.]
T. B. BLACKSTONE. [SEAL.]
JOHN B. DRAKE. [SEAL.]

Attest: C. H. FOSTER, *Secretary.*

STATE OF ILLINOIS, }
County of Cook, } ss:

T. B. Blackstone, being first duly sworn, says that he is a freeholder in the county of Cook and State of Illinois, and is worth the sum of twenty-five thousand dollars over and above all his debts, liabilities, and exemptions on property situate within said State.

T. B. BLACKSTONE.

Subscribed and sworn to before me this 23d day of March, 1886.

HORACE E. R. WOOD,
Notary Public.

STATE OF ILLINOIS, *County of Cook:*

John B. Drake, being first duly sworn, says that he is a freeholder in the county of Cook and State of Illinois, and is worth the sum of twenty-five thousand dollars over and above all his
185 debts, liabilities, and exemptions in property situate within said State.

JOHN B. DRAKE.

Subscribed and sworn to before me this 23d day of March, A. D. 1886.

[SEAL.] HORACE E. R. WOOD,
Notary Public.

Approved:
W. Q. GRESHAM,
Circuit Judge.
March 23, 1886.

(Indorsed:) Filed March 27th, 1886. F. M. Stewart, clerk.

186 UNITED STATES OF AMERICA, *ss:*

To Henry H. Waterman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1886, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Wisconsin, wherein The Chicago and Alton Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

R. BUNN, *Judge.*

187 [Endorsed:] Supreme Court of the United States. The Chicago & Alton Railroad Company, pl'ff in error, *vs.* Henry H. Waterman, def't in error. Citation. Service admitted. Wm. Ruger, att'y for def't in error. Filed March 27, 1886. F. M. Stewart, clerk.

188 WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in the above-entitled cause, and that it is a correct transcript therefrom, and also a true copy of the security on the writ of error and the original citation and service thereof under said writ.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court, at my office, in the city of Madison, this 30th day of September, A. D. 1886, and of our Independence the one hundred and eleventh.

[Seal U. S. Circuit Court, Western District of Wisconsin.]

F. M. STEWART, *Clerk.*

Endorsed on cover: W. Wisconsin C. C. U. S. No. 392. The Chicago and Alton Railroad Company, plaintiff in error, *vs.* Henry H. Waterman. Filed October 4th, 1886.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 118.

THE CHICAGO AND ALTON RAILROAD COMPANY,
Plaintiff in Error,

vs.

HENRY H. WATERMAN, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

OGDEN H. FETHERS,
Of Counsel for Plaintiff in Error.

H. I. ROTHROCK, PRINTER, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 118.

THE CHICAGO & ALTON RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

HENRY H. WATERMAN, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

The judgment in this case was rendered in an action by Henry H. Waterman against the plaintiff in error to recover for injuries alleged to have been sustained by him on the 29th day of December, 1882, while riding in a stock car loaded with sheep and hogs, and being part of a train of the Chicago, Milwaukee & St. Paul Railway Company, said train being upon the tracks of the Pittsburgh, Cincinnati & St. Louis Railway Company (commonly called the Pan-Handle Company), near the Union Stock Yards in the city of Chicago, and was backed into by an engine and tender belonging to the plaintiff in error, proceeding in the same direction upon a parallel track, also belonging to said Pan-Handle Company, the two trains coming in contact through an open switch.

The verified complaint alleges that the plaintiff is a resident of the State of Wisconsin; that the defendant is an Illinois corporation; that the Chicago, Milwaukee & St. Paul Railway Company is a Wisconsin corporation; that the Union Stock Yards Company is an Illinois corporation; that the Pittsburgh, Cincinnati & St. Louis Railway Company (commonly called the Pan-Handle Company) is a railway corporation and owns two certain lines of railway track, extending from Michigan avenue, in said city of Chicago, southerly through Brighton Park and across Archer avenue, in said city, and thence to or near to the Union Stock Yards; that the Union Stock Yards Company also owns two certain lines of railway extending from its stock yards northerly along and adjacent to said two lines of railway track of said Pan-Handle Company aforementioned, and as shown by the map attached to the complaint (Record, page 10), illustrating and showing the location and relative positions of these portions of said lines of railway track of the Pan-Handle Company and the Union Stock Yards Company, which lie immediately south of Archer avenue, with their switches, connecting tracks, and appurtenances.

(On the trial this map was conceded to be correct.)

The complaint further states that, in pursuance of some contract or license, the defendant and the Chicago, Milwaukee & St. Paul Company are permitted to and do use each of the several lines of railway track, switches, and connecting track represented on said map, and in so doing the same do severally avail themselves of the services of, and employ and use as their own servants, the switch-tenders and other servants and agents of the Union Stock Yards Company and the Pan-Handle Company having charge of said tracks, switches, and connecting tracks.

The complaint further states that on the morning of December 29, 1882, plaintiff was lawfully riding as a

passenger in the freight car of a stock train of said Chicago, Milwaukee & St. Paul Railway Company, consisting of one engine and eighteen stock or freight cars, and which was en route to said stock yards by way of the Pan-Handle line of railway and the connecting lines aforementioned; that the plaintiff was part owner of and had in his charge two car-loads of live stock, which were part of said train, one of which was loaded with hogs and sheep, and was located next to the engine; that in caring for his stock it was necessary that he should ride in the car containing his hogs and sheep; that as said train was proceeding southerly toward the stock yards, upon the most easterly of the two tracks of the Pan-Handle Company, it was compelled to and did come to a stop by reason of the fact that an engine of the defendant's, with one car of coal attached, was standing or moving northerly upon the same track south of and near to switch "B" of said track as represented on the map; and that defendant's said engine and car were in charge of two of its servants, acting as engineer and fireman; that for the purpose of allowing defendant's engine to be moved out of the way so that the train on which the plaintiff was riding might pass on toward its destination one of the switch-tenders having charge of the switches shown on the map so placed the two switches marked "A" and "B" that the defendant's engine and car moved the same over the cross-over track to and upon the westerly track of the Pan-Handle Company, and then came to a stop upon or near switch "A"; that, thereupon, the switch-tender replaced switch "B" and signaled the engineer of the train upon which the plaintiff was riding to move forward with his train, which he did, and had proceeded southerly until the car in which the plaintiff was riding was at or near the point of intersection with the rail of the cross-over track, when defendant's servants in charge

of its engine and coal car suddenly, wrongfully, recklessly, and negligently started defendent's engine and car, and rapidly run them on said cross-over track, and drove and propelled the said coal car with great speed, force, and violence against the car in which the plaintiff was riding, and thereby forced and drove one portion thereof, or of the contents thereof, against and upon his left side and back, whereby he was greatly bruised and injured.

The complaint further alleges that defendant's servants in charge of its engine and coal car started the same without having received any signal so to do, and run the same with great speed, force, and violence against said car in which plaintiff was riding, notwithstanding that they were warned and signaled to stop; that in so doing the defendant and its servants were guilty of very gross negligence; that plaintiff received injuries which he alleges have permanently incapacitated him for any labor or business, and that his injuries have caused serious inflammation and disease of the spinal cord; that he has become partially paralyzed; and that said paralysis and disabled condition of his spinal cord are progressive and increasive. (The complaint was verified August 8, 1884.)

The verified answer admits the residence of the plaintiff to be in Wisconsin; that the defendant and other railway companies named in the complaint, together with the Union Stock Yards Company, are corporations for the purposes alleged in the complaint; that, in the management of their tracks, the Union Stock Yards Company and the Pan-Handle Company each employ switch-tenders and other agents and servants; but denies that the plaintiff sustained injuries at or about the time or in the manner mentioned in his complaint; and, further, answering, and as a defense to said complaint, denies each and every allegation therein contained, except as hereinbefore expressly admitted. (Record, pages 7–11, inclusive.)

The case was tried before the honorable Romanzo Bunn, district judge for the western district of Wisconsin, and a jury, beginning on the 21st day of January, 1885, and ending on the 12th day of January, 1886.

As the charge of the court, its refusals to charge as requested by the defendant, together with other rulings, necessitates a review of the facts as disclosed upon the trial, there has been preserved in the bill of exceptions all of the testimony deemed by the respective counsel to be material.

The plaintiff, for the purpose of showing negligence on the part of the defendant and its servants, himself gave testimony tending to show that he was about forty-six years of age at the time of the trial; that his last business was stock buying; that he left Milton, Wis., for Chicago, with one car of cattle and one car of hogs and sheep, on the 28th of December, 1882, about 5 p. m.; that the hogs and sheep were in an open-slatted car and separated by a gate; that this car was next to the caboose until they reached Chicago; that shortly after midnight he left the caboose and got into the car with the sheep, and remained there with them all night; that it was a cold night; that the car in which he was riding was placed next to the engine after reaching Chicago; that there were eighteen to twenty cars in the train; that he noticed defendant's switch engine and car of coal near switch "A"; that this engine backed toward the car in which he was with his sheep and hogs; that he jumped toward the window in the rear end of the car and grabbed an iron rod near the window with his left hand just as defendant's coal car struck the one in which he was riding; that he became unconscious for a minute; that, when he recovered, his feet were up at an angle of about 45 degrees, with his left hand still hold of the rod, with the sheep crowding against him, and one stag sheep with large horns was pressing against his back

pretty hard; that plaintiff's feet were up near the roof of the car; that the sheep were piled up in the roof of the car, but that none of them were injured in the slightest degree to his knowledge; that, after regaining his feet, he tried to get out of the car when a sharp pain caught him in the left side near the back bone; that he let go his hold, and, in a minute, tried again to leave the car, when the same pain caught him; that when he got out of the car the same pain again caught him in the back; that he was *pretty badly scared*, and had not got over it when he reached home, about seventeen hours later; that he felt some pain in his side occasionally through the day; that he reached home about midnight and had his side bathed with camphor; that there was *no discoloration* of his side and back, *no breaking of the skin, no bruised condition or appearance*, and *no swelling;* that he gradually grew worse; that he was entirely unable to help himself, and required waiting on day and night. (Record, pages 16–24.)

The plaintiff also introduced as a witness Doctor William Borden, who testified that he saw the plaintiff on the morning of December 30, 1882; found him with soreness, and pain on motion, on the left side of the spinal column near the small of the back where the muscles are; that there was *no discoloration of the skin, no bruises, no swelling, no tenderness*, and *no flinching* when he pressed upon the skin, or upon the processes, but there was a tenderness when he pressed on the long rib, or under the long rib; (side page, 72); there seemed to be *no indication of a fracture of any of the ribs, or of the spinal processes, or a disturbance or injury to the bones* (side page, 81); *that the tenderness of the muscles at the side went off in a few days; that it was purely local* (side page, 84); that he assumed from the outset that this difficulty was the result of external violence of an external force applied to the body, and took it for granted that the patient was injured, and that he accounted for

all his symptoms and his condition as the result of the injuries (side page, 82); that *patient's condition when he first saw him indicated concussion* (side page, 84); that he did n't think the plaintiff would ever be able to do much physical labor or carry on business; that he was liable to require assistance a good while, if he lived (side page, 81).

Drs. Philip Fox, William Fox, Solon Marks, and Clark Gapen were called by the plaintiff as experts, and in answer to plaintiff's hypothetical questions (Record, pages 88, 43, and 47,) stated their opinions to be, in substance, that the plaintiff's condition at the time of the trial was the result of injuries received in the collision.

These hypothetical questions (Record, pages 38, 43, and 47) were each objected to by defendant's counsel as incompetent and immaterial, and upon the further ground hat the hypothetical question does not state the evidence correctly which it purports to include in the question, and that it excludes all of the constitutional, or idiopathic, conditions which should have been included in the question. The objection was overruled by the court, to which ruling the defendant duly excepted. (Record, page 44, and side page, 91.) The defendant also renewed his objection to these hypothetical questions each time they were asked of plaintiff's expert witnesses, the court made the same ruling, and the defendant duly excepted. (Record, page 47; side page, 98; Record, page 48; side page, 99; record, page 49; side page, 101; Record, page 50; side page, 102.)

The following questions were asked Dr. William Fox on his cross-examination:

Question. You noticed as that question (plaintiff's hypothetical question) was read that it left out the whole of the night's operations and of his exposure, did you not?

Answer. Yes, sir.

Q. So that when you answer it you only answer it on the basis of the question as it stands?

A. Yes, sir. (Record, page 49; side page, 101.) In this case there is no element of concussion in my judgment. (Record, page 51; side page, 105.)

Dr. S. Marks, on his cross-examination, said:

"Constitutional difficulties might produce all of the symptons recited in the history of plaintiff's case and produce the same condition the plaintiff is in."

Dr. Clarke Gapen said, on cross examination:

"I base my answer on the hypothetical question. I know nothing of the case except what is contained in that. In this question I do not see any evidence of concussion in the strict sense. I should eliminate the idea of concussion entirely—drop it right out." (Record, page 51; side page, 105.)

The plaintiff also introduced as a witness, Martin Murphy, who was the switchman for the Pan-Handle road, and his testimony tended to show that it was his duty to give trains the right of way, to put them in their proper places, signal them, and tell them when to move, at the Brighton Park Station, the place where the accident occurred; that he attended to six switches, opening and closing them; that defendant's engine crossed over from switch "B" to switch "A"; that *he* stood at switch "B" and signalled the C. M. & St. P. train to come on south, when defendant's engine backed down toward switch "B" and struck the car in which plaintiff was riding; that the switch-target at switch "A" showed that the switch was not right for defendant's engine, and that this switch-target could be seen from the engine; that defendant's coal car scraped the St. Paul engine first and raised it up about 3 feet from the track (Record, pages 24 and 25); that one Thomas Mann, who was employed by the Stock Yards Company, threw the switches "B" and "A," that let defendant's engine up to where it stood

on the west track; *that he had no supervision over Thomas Mann; that they gave themselves authority to exert authority over one another; that they helped one another out;* that he supposed the Pan-Handle Company knew they worked into each other's hands, for they were often there and never said different; that he was put there in the employment of the Pan-Handle Company, and told which were its tracks and to attend to its switches; that it was a matter of convenience between Thomas Mann and himself that they helped each other; Thomas Mann threw switch "B" to the tracks witness was employed to attend to; that the car in which plaintiff was riding settled right down on the track in the very spot where it was raised from as soon as the defendant's car was pulled away; that he saw the plaintiff; that he didn't appear to be excited, but seemed to be perfectly cool. (Record, pages 26 and 27.)

The plaintiff also introduced as a witness Thomas Mann, who was switchman for the Union Stock Yards Company, and his testimony tended to show that he turned switch "B" and afterward went to switch "A" and turned it, and gave a signal to go ahead; that when defendant's engine was pulled over switch "A" somebody from the engine said "all right," and at that the engineer commenced backing on to the connection where he came from; that witness said "hold on, or you will go into the Milwaukee"; that the engineer did all he could to stop, but not in time; that he lightly struck the Milwaukee train and hardly raised their wheels—raised them about 2 feet; that both trains were going in practically the same direction; that they came together, that is all; that he gave no signal to defendant's engine to back toward the crossing; *that he had no employment by the Pan-Handle Company at all; that he turned switches for Murphy and Murphy for him;* that he saw the plaintiff after the acci-

dent and talked with him; that he didn't complain of any injury, neither did his appearance indicate any; that he didn't seem to be at all nervous or excited; that when the two trains came together they were moving about as fast as a man would ordinarily walk; that the Milwaukee train had put on brakes, and the defendant's engineer had reversed his engine before they came together. (Record, pages 27–29.)

The plaintiff also introduced as a witness John J. Flinn, switchman, whose testimony tended to show that he was on the C. M. & St. P. engine the morning in question; that his train had stopped on the east Pan-Handle track to let the defendant's engine get out of the way; that when the St. Paul train started it had gone about 100 or 125 feet when defendant's engine came back over the connection; that the tank of defendant's engine lifted the wheels of the car in which the plaintiff was riding about 2 to 2½ feet from the track at one end; that at the other end this stock car was only tipped about 8 inches; that it was not derailed, but settled right down on the track as soon as defendant's train was drawn away; that he saw the plaintiff and conversed with him; that plaintiff made a remark to the effect that he was in the car and that if it had tipped over he was on the top side and could have got out all right, and the further remark, in effect, that he was cool and able to take care of himself; that plaintiff made no pretense of any injury in the presence of the witness; that they rode together on the engine down to the Stock Yards, a distance of about 2 miles, and he made no complaint then or upon reaching the Stock Yards; that none of the slats in the stock car were broken, to his knowledge, but that it was scratched a little and a corner of the roof raised. (Record, pages 29-31.)

The plaintiff also introduced as a witness, M. S. Rogers,

the engineer, who also described the manner in which the two trains came together; he also testified that, to the best of his judgment, the plaintiff was perfectly cool and gave no evidence of being excited. (Record, page 31.)

The plaintiff also introduced the further testimony of several of his neighbors, tending to show that before the 29th day of December, 1882, the plaintiff was apparently in good health, and that, after his return from Chicago, his health failed and he gradually grew worse, and had been confined to his bed the greater part of the time. (Record, pages 33-35.)

The plaintiff thereupon rested.

The defendant thereupon introduced the testimony of Drs. Nicholas Senn, Joseph B. Whiting, S. B. Buckmaster, and A. J. Ward, which tended to show that, even assuming the plaintiff's testimony to be true, together with all of the facts and circumstances stated in connection with the alleged injury, and the subsequent history of the case, plaintiff's condition was plainly the result of disease and not of any injury; that no traumatic injury whatever could give rise to the kind of degeneration or pathological condition recognized in the plaintiff; and that there was no element of concussion manifest. (Record, pages 58-9, 63, 67, 68.)

Dr. Senn: "The fact that a man was apparently in good health up to a given time has no value. I have seen these patients present all evidences of general health when they first commenced to manifest these symptoms." (Record, page 59; side page, 122.)

The defendant then proved, by Frank B. Tracy, that defendant's cars passed over the Pan-Handle track at Brighton Park by permission; that the Pan-Handle Com-

pany control their own tracks, and when foreign cars come upon them they have to be subject to whatever rules are made by the Pan-Handle Company; that this was so in December, 1882.

The defendant then proved, by Patrick H. Herrin, defendant's yardmaster at Brighton Park, that when defendant's trains leave its tracks to go upon the tracks of the Pan-Handle road, they are subject to the orders of the men in charge of those tracks and have to obey their signals; that he did not see the two trains when they came together, but was there a few minutes after; that he saw the plaintiff and heard him say he was not hurt; that it was the duty of the witness to make an examination and report whenever any accident occurs; that he examined the car in which plaintiff was riding and didn't see that it was broken any, and that he had examined his report made to the defendant the same afternoon. (Record, pages 69–71.)

The defendant then proved, by Charles J. Lynch, the engineer in charge of its engine in question, that he went through switch "B" and "A," and came to a dead stop about 60 feet north of switch "A;" that from where he stood on the right side of the engine he could not see switch "A," or the switch-opening, so he said to the fireman, "How is it back there; can you see those plates?" That the fireman put his head out of the cab-window and said, "All right; back up;" that he then backed, supposing that the switch was shut; that he finally saw his car was going through the connection, when he immediately reversed his engine; that if he had had 2 feet more room the cars would not have come together at all; that the corner of his tank caught under the forward end of the St. Paul stock car (and the car in which plaintiff was riding), and both were dragged by the St. Paul engine; that there was no shock or jar; that he examined the stock

car well to see if it was injured, and the only injury was a little piece along the side of the car where a knot or bolt had scratched it. (Record, pages 71–73.)

The defendant also proved, by John Miller, its yard-conductor, that at the time in question he was standing on the west side between switch "B" and switch "A;" that he saw the plaintiff on the east side of his car, near the north end, standing in an upright position, with his hands hold of the slats of the inside of the car; that, after plaintiff got out of the car, witness asked him if he was hurt, and that plaintiff replied, "No; but when will I get away from here?" (Record, page 74.)

Robert Allen also testified that he heard this conversation. (Record, page 73.)

The defendant also offered in evidence the deposition of Martin Williams, who testified that he was the fireman on defendant's engine in question; that, after they had backed up to switch "A," he saw the St. Paul train headed south on the inside Pan-Handle track, and that defendant's train was on the other Pan-Handle track headed north; that, after defendant's train had run up off switch "A," *witness got a signal given to him to run up;* that the man who gave him the signal was standing near switch "A" on the inside; that the signal was a wave of the hand—*the usual sign for backing up;* that he gave the signal to the engineer, and defendant's train was backed into the St. Paul train; *that when he got the signal defendant's engine was north of the switch, about the length-and-a-half of a car;* that the man who gave the signal came round the hind end of the car and gave the signal to back up; that this man was on the north of the switch-target when he gave the signal, and was looking toward the witness. (Record, pages 73–75.)

Whereupon the defendant rested.

The plaintiff then recalled Martin Murphy, the Pan-

Handle switchman, who testified that he saw Thomas Mann when he was at switch "A."

Question by plaintiff's counsel: Did Mann give any signal to the C. & A. engine to back up, *that you saw?*

(This question was objected to by defendant's counsel, the objection was overruled, and an exception taken to the ruling by the defendant.)

Answer. No, sir; I did not see him give any signal. (Record, page 77; side page, 158. See record, page 26; side page, 53.)

The plaintiff then recalled Thomas Mann who testified: I didn't give a signal to the C. & A. train to back up. I gave them a signal to stop.

During the progress of his argument to the jury, Mr. Sloan, one of the attorneys for the plaintiff, said to the jury as follows:

"When a railway company goes into a litigation against a man they never stop that litigation until the last hour to which the case can be taken is reached."

(To which statement to the jury the defendant duly excepted.)

Mr. Sloan, continuing, said:

"I think it is a matter of general experience and knowledge. Of course, I can argue that and infer it, gentlemen, from the fact that the income yearly of such a road as the Alton road, as everybody knows it to be, is millions of dollars, not hundreds and not thousands, as an individual, and when we get a verdict here poor Waterman has this long road to travel. The case has been taken from the State court and brought into this United States court, and he has this long and expensive road to travel to Washington, to the Supreme Court of the United States, where cases are hung up for four years before determination."

(To which statement to the jury the defendant's counsel duly excepted.)

Mr. Sloan also said to the jury:

"Then about seeing double. Could he tell whether a thing was double or single? I think it will not be improper for me to explain how that occurred. If Mr. Fethers does not object I will say that when these physicians were there we meant to have proved it.

Dr. Senn asked: Does he see double?

Dr. Borden replied, No.

Waterman spoke up and said: Yes; I can see double."

(Objected to.)

Mr. Sloan: "I said it was improper, and the only thing I did it for was to relieve Dr. Senn."

Mr. Fethers: "I wish an exception."

Court: "I think there ought not to be statements of that kind."

Mr. Sloan: "Certainly; but I think it is just to Dr. Senn to state it."

Mr. Sloan further said to the jury:

"This defendant is a railroad, but you have no right, and I am the last man to ask you to give a dollar to the plaintiff that you would not give if the defendant was an individual with as ample means. There is this satisfaction of knowing that, take a great and prosperous railroad company, like the Chicago & Alton, with its 850 miles of railroad, its income of millions of dollars, that $50,000 is no more than $500 to a man of a fortune of $100,000."

(To which statement to the jury counsel for the defendant duly excepted.)

Mr. Sloan further said to the jury:

"Now, I think you should give such a sum that, when all the expenses of the litigation are deducted, it will

leave to Waterman such a sum as will raise himself and family during the remainder of the years of his life above want."

(To which statement to the jury the defendant's counsel duly excepted.)

Mr. Sloan further said to the jury:

"Will you give such a sum that, when the expenses of this litigation and of the coming litigation, when this case travels to Washington, in the Supreme Court, will give poor Waterman nothing?"

(To which statement to the jury defendant's counsel duly excepted)

The court, in charging the jury, said:

"Gentlemen: I will give you these special instructions at the instance of the defendants counsel in the case;" and, thereupon, read to the jury all of said special instructions except those numbered 8 and 10, respectively. (Record, page 82; side page, 168.)

Special instructions 8 and 10 are:

"8. The proper place for any person riding as a passenger upon freight trains is in the caboose of such train, and it is negligence upon the part of such passenger to be riding in a stock car. It was, therefore, negligence on the part of the plaintiff in this case to be riding in the car with his sheep at the time and place in question. If, therefore, you shall find that such negligence on his part *contributed to produce the plaintiff's condition*, which would have been avoided by the exercise of ordinary care on his part, then, in that event, your verdict must be for the defendant.

"10. It appears, by the evidence, that the witness, *Mann*, had no duty to discharge at switches "A" and "B," and that his assuming to discharge the duties of the regular switch-tender at those points was unauthorized; and if

you further find, from the evidence, that the neglect on the part of *Murphy*, the agent and employé of the Pan-Handle Company to attend to his duties in relation thereto was the cause of, or in any way contributed to, the coming together of the two trains in question, then, in that event, the plaintiff must look to the said Pan-Handle Company for redress, and your verdict here must be for the defendant."

(Record, page 80.)

The court, in charging the jury, among other things, said:

"The evidence all tends to show, and I believe there is no contention to the contrary, that the train on which the plaintiff was riding had a right to be where it was, and, so far as appears, the plaintiff also had a right to be where he was upon that train; at least, I see no evidence tending to show that he had not."

(Record, page 83; side page, 169.)

The court further charged, as follows:

"That the plaintiff's present bodily condition is a diseased and abnormal one, in a marked degree, all the evidence on both sides abundantly shows. The evidence is also agreed that he is now and for some time has been suffering from disease of the spine, either of the marrow or substance of the spinal cord itself, or of the membranes, integuments, surroundings thereof, or both of these. The physicians also pretty generally agree that the disease may be incurable, and that the plaintiff will never fully recover from it. Where they do not agree is upon the proper diagnosis of the disease as to its cause, and particularly whether it was the result of the railway collision on the morning of December 29, 1882. The plaintiff's evidence tends to show that previous to this accident the plaintiff was generally well and in good health and capable of attending to his daily business; that immediately after this accident he began having pains in his side and back, and became rapidly helpless and unable to do business; that he gradually lost the

accustomed use of his lower extremities and has from that time to this been mainly confined to his room or bed, requiring constant care, nursing, and attendance. If the jury should find these facts to be true, from the evidence, they should be considered and given due and proper weight, as tending to show that he received an injury from the collision which is the cause of his diseased and disabled condition; but, of course, the jury should guard against coming to a too hasty conclusion from this evidence that the collision, and the plaintiff's immediate subsequent ailment, stand to each other in the relation of cause and effect, because it is easy to see that they may be mere coincidences in point of time and have no other relation. There can be no doubt that the bearing of this evidence is in the plaintiff's favor, and is to be considered in connection with all the other testimony, including that of the medical experts, and given such weight as you think it, upon the whole, reasonably and fairly entitled to."

(Record, page 85; side pages, 174–175.)

The court further charged as follows:

"I wish to add that it is perfectly evident, from the nature of the case and the injury, that the damages which the plaintiff will be entitled to recover, if you find a verdict for him, will be to a certain extent in the discretion of the jury or in the sound judgment of the jury from the testimony. It should be commensurate as nearly as may be with the nature and extent of the injury and the pecuniary loss which the plaintiff has sustained and will sustain as a direct consequence of it and the pain and suffering and anguish, bodily and mental, which he has and will sustain as a direct consequence of the injury. Of course, the jury will see that in one sense money can never compensate, however great your verdict might be, for an injury of this kind. There is no man in his senses who would be put in the condition which the plaintiff is evidently in for money at all. In this case the plaintiff can never be compensated, but so far as he can be compensated in that way the verdict

should be fairly commensurate with the nature and extent of the injury."

Record, page 86, side page, 177.

Verdict for plaintiff and motion for new trial by defendant, assigning grounds; motion overruled and judgment ordered. (Record, page 15.)

Separate exceptions to the refusal on the part of the court to charge as requested, and also to each of those portions of the charge given above, were duly taken by defendant's counsel on the said 12th day of January, 1886, at the same term of court the action was tried, after motion for a new trial was overruled and judgment entered; and the same were duly allowed by the court and made a part of the bill of exceptions, settled and signed by the judge, (Record, pages 15 and 87) as sanctioned by rule 58, common law rules of the circuit court of the United States for the western district of Wisconsin, and the law and practice of the State of Wisconsin, to wit:

Section 2869, Revised Statutes of the State of Wisconsin:

"In any trial by jury, if an exception be taken, it may be reduced to writing at the time, signed by the judge, without seal, and filed as part of the record; or it may be entered in the judge's minutes and afterward settled by the judge separately, in like manner, or in a bill of exceptions. *Either party may, at any time before the close of the term of court at which the action is tried, except to any part of the judge's charge to the jury, not given with his express consent, with the same effect as if done at the trial before the jury retired.*"

Assignment of Errors.

First: The court erred, in charging the jury, as follows:

"The evidence all tends to show, and I believe there is no contention to the contrary, that the train on which

the plaintiff was riding had a right to be where it was, and, so far as appears, the plaintiff also had a right to be where he was upon that train; at least, I see no evidence tending to show that he had not."

Second: The court erred, in charging the jury, as follows :

"That the plaintiff's present bodily condition is a diseased and abnormal one, in a marked degree, all the evidence on both sides abundantly shows. The evidence is also agreed that he is now and for some time has been suffering from disease of the spine, either of the marrow or substance of the spinal cord itself, or of the membranes, integuments, surroundings thereof, or both or all of these. The physicians also pretty generally agree that the disease may be incurable, and that the plaintiff will never fully recover from it. Where they do not agree is upon the proper diagnosis of the disease and as to its cause, and particularly whether it was the result of the railway collision on the morning of December 29, 1882. The plaintiff's evidence tends to show that, previous to this accident, the plaintiff was generally well and in good health and capable of attending to his daily business; that immediately after this accident he began having pains in his side and back and became rapidly helpless and unable to do business; that he gradually lost the accustomed use of his lower extremities and has from that time to this been mainly confined to his room or bed, requiring constant care, nursing, or attendance. If the jury should find these facts to be true from the evidence, they should be considered and given due and proper weight as tending to show that he received an injury from the collision which is the cause of his diseased and disabled condition; but, of course, the jury should guard against coming to a too hasty conclusion from this evidence that the collision and the plaintiff's immediate subsequent ailment stand to each other in the relation of cause and effect, because it is easy to see that they may be mere coincidences in point of time and have no other relation. There can be no doubt that the bearing

of this evidence is in the plaintiff's favor, and is to be considered in connection with all the other testimony, including that of the medical experts, and given such weight as you think it, upon the whole, reasonably and fairly entitled to."

Third: The court erred, in charging the jury, as follows:

"I wish to add that it is perfectly evident, from the nature of the case and the injury, that the damages which the plaintiff will be entitled to recover, if you find a verdict for him, will be to a certain extent in the discretion of the jury, or in the sound judgment of the jury from the testimony. It should be commensurate as nearly as may be with the nature and extent of the injury and the pecuniary loss which the plaintiff has sustained, and will sustain as a direct consequence of the injury. Of course, the jury will see that in one sense money can never compensate, however great your verdict might be, for an injury of this kind. There is no man in his senses who would be put in the condition which the plaintiff is evidently in for money at all. In this case the plaintiff can never be compensated, but, so far as he can be compensated in that way, the verdict should be fairly commensurate with the nature and extent of the injury."

Fourth. The court erred in refusing to give defendant's special instruction, numbered 8:

"8. The proper place for any person riding as a passenger upon freight trains is in the caboose of such train, and it is negligence upon the part of such passenger to be riding in a stock car. It was, therefore, negligence on the part of the plaintiff in this case to be riding in the car with his sheep at the time and place in question. If, therefore, you shall find that such negligence on his part contributed to produce the plaintiff's condition, which would have been avoided by the exercise of ordinary care on his part, then, in that event, your verdict must be for the defendant."

Fifth. The court erred in refusing to give defendant's special instruction, numbered 10:

"10. It appears by the evidence that the witness Mann had no duty to discharge at switches "A" and "B," and that his assuming to discharge the duties of the regular switch-tender at those points was unauthorized; and, if you further find from the evidence that the neglect on the part of Murphy, the agent and employé of the Pan-Handle Company, to attend to his duties in relation thereto was the cause of, or in any way contributed to, the coming together of the two trains in question, then, in that event, the plaintiff must look to the said Pan-Handle Company for redress, and your verdict here must be for the defendant."

Sixth. The court erred in permitting Mr. Sloan, one of plaintiff's counsel, while addressing the jury, and against defendant's objection, to make the inflammatory and scandalous statements he did, without reproof and without directing the jury to disregard such statements made by the counsel wholly outside of the testimony and the record in the case.

Seventh. The court erred in its rulings admitting testimony of the plaintiff.

Eighth. The court erred in its rulings in rejecting testimony of the defendant.

Ninth. The court erred in overruling the motion to set aside the verdict and grant a new trial upon the minutes of the court, and upon the further ground that the damages were excessive.

I.

The court erred in charging the jury, as follows:

"*The evidence all tends to show, and I believe there is no contention to the contrary, that the train on which the plaintiff*

was riding had a right to be where it was, and, so far as appears, the plaintiff also had a right to be where he was upon that train; at least, I see no evidence tending to show that he had not."

The charge is substantially the opposite in effect to the defendant's "Request No. 8," which the refusal to give is our fourth assignment of error. But the giving this charge is more clearly error than the not giving the instruction asked for, inasmuch as it virtually takes the question of contributory negligence from the jury. We shall confine ourselves to the discussion of this phase of the question here, leaving the question of whether or not the being in the stock car constituted negligence on the part of the plaintiff sufficient to preclude his recovery, and calling for an instruction to that effect, to be discussed under the fourth assignment of error on the refusal to give such an instruction.

The plaintiff, at the time of the accident, was in a stock car next to the engine. The words "and so far as appears the plaintiff also had a right to be where he was upon that train" clearly implies that he was not negligent in being there, as he was *rightfully* there, and the jury must have taken the effect of these words to be that they should impute no negligence to him on account of his being in this car. According to the great weight of authority, if the plaintiff had been guilty of the slightest want of ordinary care, materially contributing to his injury, he is debarred from recovering for such injury, even though it resulted, in some measure, from the negligence of the defendant, unless that negligence was wanton or willful.

Randall *vs.* N. W. Telegraph Co., 54 Wis., 140, and cases cited.

Where the facts are undisputed, as here, that the plaintiff was in the car at the time of the accident, and that

had he been in any other place he would not have been injured by the accident, it becomes the duty of the court, if the being there is plainly and undeniably negligence, to so charge the jury; or if there be any doubt on the question, to submit it to the jury for their decision on the facts and circumstances in the case. If it be said that merely being in the stock car was not enough to charge the plaintiff with negligence, still the charge that he was *rightfully* there excludes from the jury innumerable contingencies that might cause it to become negligence.

In 2 Thompson on Trials, page 108, it is said, in regard to evidence of defendant's negligence, that "to withdraw such a case from the jury, the *facts* should not only be undisputed, but the *inferences*, in respect to the defendant's negligence."

R. R. Co. *vs.* Stout, 17 Wall., 657.

This rule is equally applicable to evidence of the plaintiff's negligence.

The stock car was without question not built for the use of passengers; not provided with doors and platforms to facilitate entrance and exit; nor chairs for comfort; nor any kind of heating apparatus; but was simply an open, slatted car in which a person riding would be exposed to the weather. It was also subject to more dangers than the car which was provided for the reception of passengers owing to its place in the train; and it is undisputed that had the plaintiff been in the caboose he would have escaped any injury from the collision. If the plaintiff, therefore, could in any event be in this car and not subject himself to the imputation of negligence, he could be so only by reason of some duty requiring his presence there, or some other excuse, the weight and sufficiency of which should be decided by the jury in view of all the testimony. The plaintiff was not in the stock car during

the early part of the journey, but went in there about midnight, as he testifies, to keep his sheep up so that he would not lose them. In some cases a man will be justified in running some risk to save his property, in others it may be gross negligence, or nearly suicide. If a man's sheep should be caught on the railroad crossing, and he should go on the track and attempt to extricate it, though he saw a train running 20 or 30 miles an hour approaching, it would plainly be the duty of the court to say that his act precluded him or his representatives from recovering damages from the railway company if he was hurt or killed, even though the servants of the company upon the train were guilty of negligence in not ringing the bell, or blowing the whistle near the crossing. Under the facts and circumstances upon which a court is unable to say, as a *matter of law*, that the plaintiff is either guilty of no negligence, or guilty of such negligence as would preclude his recovery, the question should be submitted to the jury. In this case the defendant contends that the condition of the plaintiff upon the trial was either caused by disease arising from his exposure in the stock car on the cold winter night on which the ride was taken, or from some constitutional difficulty wholly disconnected with the accident; and, we respectfully submit, that in this case, if the honorable circuit judge was not convinced that the fact of the plaintiff's being in the stock car was negligence, then the question whether it was negligence, which would include the question of whether or not there was a necessity for some one to be in the car in order to preserve the sheep; whether or not, if there was such a necessity, it would justify the plaintiff in running the incidental risk in trying to protect his property; whether or not the riding in the open stock car in the cold was liable to, or did produce or contribute to produce the plaintiff's condition, should have been

submitted to the jury for their consideration, to aid in determining whether or not the defendant was liable, even if we should concede negligence on its part; and, we also respectfully submit, that the charge that "the plaintiff also had a right to be where he was upon that train" could have had no other effect on the minds of the jury than to withdraw the fact of his being upon the stock car, the reasons therefor, and their sufficiency, from the consideration of the jury in determining the question of contributory negligence; in effect, the whole question of contributory negligence is thus unavoidably withdrawn from the jury. The further qualifying words, "at least I see no evidence tending to show that he had not," serve to intensify the prejudicial effect of those immediately preceding, as they naturally lead a jury to believe that in order to charge the plaintiff with contributory negligence, the defendant was required to produce evidence showing him to be negligent, and to debar them from considering, in determining this question, any evidence offered by the plaintiff tending to show him to have been negligent.

II.

The court erred, in charging the jury, as follows:

"That the plaintiff's present bodily condition is a diseased and abnormal one in a marked degree, all the evidence on both sides abundantly shows. The evidence is also agreed that he is now and for some time has been suffering from disease of the spine, either of the marrow or substance of the spinal cord itself, or of the membranes, integuments, surroundings thereof, or both or all of these. The physicians also pretty generally agree that the disease may be incurable, and that the plaintiff will never fully recover from it. Where they do not agree is upon the proper diagnosis of the disease and as to its cause, and particularly whether it was the result of the railway collision on the morning of December 29, 1882. The plaintiff's evidence tends to show that, previous to this accident, the

plaintiff was generally well and in good health and capable of attending to his daily business; that, immediately after this accident, he began having pains in his side and back, and became rapidly helpless and unable to do business; that he gradually lost the accustomed use of his lower extremities, and has from that time to this been mainly confined to his room or bed, requiring constant care, nursing, or attendance. If the jury should find these facts to be true from the evidence, they should be considered and given due and proper weight as tending to show that he received an injury from the collision which is the cause of his diseased and disabled condition; but, of course, the jury should guard against coming to a too hasty conclusion from this evidence that the collision and the plaintiff's immediate subsequent ailment stand to each other in the relation of cause and effect, because it is easy to see that they may be mere coincidences in point of time and have no other relation. There can be no doubt that the bearing of this evidence is in the plaintiff's favor, and is to be considered in connection with all the other testimony, including that of the medical experts, and given such weight as you think it, upon the whole, reasonably and fairly entitled to."

This instruction of the court, taken in its proper and ordinary meaning, and as it would fall on the minds of the jury, is nothing more nor less than a direction to find for the plaintiff. While the court has the right to make reasonable comments on the evidence, we submit that the charge excepted to is far beyond the bounds of what is allowable, and is such an expression of the court's opinion as to the weight and sufficiency of the testimony as would lead, and as did lead, the jury to decide against the defendant with the same certainty as if the court had directed them to so find in words, as well as effect. Nearly every case holding that a Federal judge has the power to review and sift the evidence is a case where either a nonsuit or a peremptory instruction to find for the plaintiff is proper; and this power is put upon the grounds that where there is no evidence, or merely a scintilla of evi-

dence, upon one side of a case a court has the power to order a new trial, if the jury should find for the side whose evidence is in such a state, and that it is mere idle form to wait until after the verdict when the same result can be obtained by a direction to the jury how to find. This is not a case calling for such procedure, or where it would be at all proper.

There are questions in this case of whether or not the defendant was negligent, and whether or not the condition of the plaintiff was caused by the accident, upon which there was much more than a scintilla of conflicting testimony, and which it was the province of the jury, and of no one but the jury, to decide, and of which it was palpable error for the court to say: "there can be no doubt that the bearing of the evidence is in the plaintiff's favor." An ordinary jury watches very closely for an intimation from the presiding judge of what he thinks of the testimony, and of the case as a whole, and when told that they "should guard against coming to a too hasty conclusion from this evidence that the collision and the plaintiff's immediate subsequent ailment stand to each other in the relation of cause and effect," they could hardly help but infer that the court was of the opinion that the conclusion *was to be reached in any event*; the only thing to guard against was being *too* hasty; and when the court proceeds and says "there is *no doubt* that the bearing of the evidence is in the plaintiff's favor," there would be but few jurors who would ever think of doing other than to find for the plaintiff, be the evidence never so strong in the defendant's favor.

It is to guard against such an influence over the jury and to preserve to the parties their constitutional right of a decision, by twelve impartial men, that the courts hold uniformly that the judge can express no opinion

upon the weight or sufficiency of the evidence, unless it is so strong as to come within a well-defined rule of law.

Adama *et al. vs.* Roberts, 2 How., 486.

Chesapeake & Ohio Canal Co. *vs.* Knapp *et al.*, 9 Peters, 541; see page 568.

State *vs.* Ah. Tong, 7 Nev., 148.

Lampe *vs.* Kennedy, 60 Wis., 110.

A brief review of the medical and other testimony will conclusively show, we think, that this instruction was improper and the giving of it was reversible error. It appears from the plaintiff's testimony that he rode in an open-slatted stock car from about 12 o'clock, midnight, until about 8 o'clock the following morning on the 29th of December; and that it was a cold night. (Record, page 16; side page, 31.) The accident occurred about 8 o'clock on the morning of the 29th of December, and the plaintiff was attended by Dr. Borden early the next morning. Dr. Borden testified that he found him with soreness, and pain on motion, on the left side of the spinal column near the small of the back where the muscles are; that there was no discoloration of the skin, no bruises, no swelling, no tenderness, and no flinching when he pressed upon the skin or upon the processes, but there was a tenderness when he pressed upon the long rib, or under the long rib; there seemed to be no indication of a fracture of any of the ribs, or of the spinal processes, or any disturbance or injury to the bones; that the tenderness of the muscles at the side went off in a few days; *that it was purely local;* that the plaintiff's condition indicated concussion. (Side pages 72–84.)

Dr. William Fox, called by the plaintiff, said:

"In this case there is no element of concussion in my judgment." (Side page, 105.)

Dr. Clark Gapen, also called by the plaintiff, said:

"I should eliminate the idea of concussion entirely—drop it right out." (Side page, 105.)

Dr. Solon Marks, also called by the plaintiff, said:

"Constitutional difficulty might produce all of the symptoms in the history of plaintiff's case and produce the same condition the plaintiff is in."

Dr. Philip Fox, also called by the plaintiff, said:

"The train of symptoms given me in the question propounded by the counsel for the plaintiff is the ordinary train of symptoms which usually accompanies spinal inflammation, whether produced by cold or unusual exposure, or fatigue, or any other idiopathic or constitutional cause." (Side page, 95.)

And he also indorsed as correct the following statement from Furtzel's translation of Rosenthal on Nervous Diseases:

"Among the external symptoms that are injurious to the nervous system we might mention the effect of cold as among the most important. I have several times had cases of ataxia originating from that cause. Among the considerable number of cases I have observed, in the Vienna General Hospital during a long series of years, cold has figured as the most frequent cause especially among the working classes." (Side page, 160.)

The medical testimony on the part of the defendant, given by Drs. Senn, Whiting, Buckmaster, and Ward was emphatic that the plaintiff's condition was the result of disease and not of an injury; that no traumatic injury whatever could give rise to the kind of degeneration or pathological condition recognized in the plaintiff; and that there was no element of concussion manifest. (Record, pages 58, 59, 63, 67, 68.)

Dr. Senn also says:

"The fact that a man was apparently in good health up to a given time has no value. I have seen these patients present all evidences of general health when they first commenced to manifest these symptoms."
(Side page, 122.)

The accidental coming together of the trains, which is alleged to have produced the injuries to the plaintiff, was conclusively shown to have been very slight. It is undisputed that defendant's engineer reversed his engine the instant he observed they were upon the connection instead of the main track, and also that the engineer on the St. Paul train had reversed his engine, so that both trains were nearly at a standstill when they came together. Defendant's engineer said:

"If I had, probably, 2 feet more room before that car and tank came together * * * the cars would not have come together at all. The motion of my train was due to being dragged along by the St. Paul train. There was no shock or jar."
(Side page, 140.)

And defendant's fireman said:

"The two trains came together very easy—there was no jar whatever, both trains moving very slow."
(Side page, 156.)

When the engine was pulled away the stock car, in which the plaintiff was riding, settled right down on the track. The plaintiff, after the accident, conversed with several of the witnesses, saying to all of them, in substance, that he was not hurt, and that he was cool and able to take care of himself. True, the plaintiff himself testified on the trial, two years later, that he was *uncon-*

scious while in the car, and that he supposed his unconsciousness was produced by the shock. (Side page, 45.)

III

The court erred, in charging the jury, as follows:

"*I wish to add that it is perfectly evident from the nature of the case and the injury that the damages which the plaintiff will be entitled to recover, if you find a verdict for him, will be to a certain extent in the discretion of the jury, or in the sound judgment of the jury from the testimony. It should be commensurate, as nearly as may be, with the nature and extent of the injury and pecuniary loss which the plaintiff has sustained and will sustain as a direct consequence of the injury. Of course, the jury will see that in one sense money can never compensate him, however great your verdict might be, for an injury of this kind. There is no man in his senses who would be put in the condition which the plaintiff is evidently in for money at all. In this case the plaintiff can never be compensated, but so far as he can be compensated in that way the verdict should be fairly commensurate with the nature and extent of the injury.*"

In view of the testimony in the case, we submit that the portion of the charge of the court herein set forth was clearly error. The language excepted to practically withdraws from the jury the question whether the plaintiff's condition resulted from an injury or from disease. This was one of the two most important questions of fact in the case. We have already shown, we think, that the great weight of the evidence tended to establish that such condition was the result of disease. But the court has but one view of the case to present to the jury, and that is that such condition was the result of an injury; for he says:

"I wish to add that it is perfectly *evident*, from the nature of the case and *the injury*," etc.; and, again, "It (the damage) should be commensurate as nearly as may

be with the nature and extent of the *injury* and pecuniary loss which the plaintiff has sustained and will sustain as a direct consequence of the *injury*;" and, again, "Money can never compensate, however great your verdict might be, for an *injury* of this kind;" and, again, "In this case the plaintiff can never be compensated, but so far as he can be compensated in that way the verdict should be fairly commensurate with the nature and extent of the *injury*."

We respectfully submit that it will be well nigh impossible to find language in any charge given by a court to a jury more prejudicial to a defendant. Further, it was not a proper rule of law for the measurement of damages in accidents arising from negligence.

The true rule of damages in this case (if the jury should have found that the accident was caused by the negligence of the defendant, and was not wanton or willful, of which there is no contention; and, further, that the accident was the immediate cause of the plaintiff's condition), was that the damages should amount to a pecuniary compensation for the wrong done.

Bussy *vs.* Donaldson, 4 Dall, 206.

The elements to be considered in arriving at what was a compensation should have been laid before the jury by the judge as they have been settled by the courts; and such elements are, all expenditures made in consequence of the injury, as for medical attendance, etc.; a fair recompense for his loss of time, as what he would otherwise have earned in his trade or profession if he had been deprived of the capacity of earning by his injuries; also, a reasonable allowance for any special mental or physical pain or suffering; and the jury should take into consideration whether or not the injury is permanent or temporary, and, if permanent, standard life and annuity tables can

be used to assist the jury in determining the probable duration of life.

Anthony *vs.* L. & N. R. Co., 27 Fed. Rep., 724.
Vicksburg & Meridan R. R. Co. *vs.* Putnam, 118 U. S., 545.
Secord *vs.* St. Paul, etc., R'y. Co., 18 Fed. Rep., 221.

The court's instructions to the jury plainly says that no matter how great an amount they might arbitrarily find for the plaintiff, they could not give him an amount sufficient to compensate him, but that they were to take that view of the case, and come as near compensating him in accordance with that view as they could.

IV.

The court erred in refusing to give the defendant's special instruction, numbered 8: The proper place for any person riding as a passenger upon freight trains is in the caboose of such train, and it is negligence upon the part of such passenger to be riding in a stock car; it was, therefore, negligence in this plaintiff to be riding in the car with his sheep at the time and place in question; if, therefore, you shall find that such negligence on his part contributed to produce the plaintiff's condition which would have been avoided by the exercise of ordinary care on his part, then, in that event, your verdict must be for the defendant.

The latter part of this instruction is plainly unobjectionable, and merely states an elementary principle of law, which is applicable to the case.

The defendant was entitled to have this instruction given, if the riding in a stock car is negligence, *per se*, or if it was negligence on the part of the plaintiff under the circumstance of this particular case as shown by the evidence. We submit that it is negligence under either view; and there can be no doubt that it contributed to

the plaintiff's alleged injuries, as the car in which he was riding was the only car affected by the accident.

In Abend *vs.* Terra Haute R. R. Co., (111 Illinois, 202), the rule as to when the plaintiff's negligence is contributory is correctly and very lucidly laid down. The court says:

"It can not be maintained as a general proposition that in actions for personal injuries caused by the defendant's negligence, the contributory negligence of the injured party will constitute no defense, except when the latter's negligence is an element or factor in producing the force causing the injury complained of. It is sufficient if the plaintiff's negligence materially contributes to his *injury*, whether it contributes to the force causing the injury or not," and cites a number of cases supporting this doctrine.

So, in this case, it is not so material whether or not the accident would have happened if plaintiff had not been in this stock car, or whether defendant's negligence caused the accident. If it appears that the *injury would not have happened to the plaintiff* had he been in any other place than he was, that the place was dangerous, and such a place as was negligent for him to be in.

The stock car in question occupied the same place in this train that is occupied by baggage cars in ordinary passenger trains. It has been held to be negligence on the part of a passenger to ride in the baggage car, and to preclude him from recovering damages, in a number of well-considered cases; among which are—

P. & R. I. R. R. Co. *vs.* Lane, adm'x, 83 Ill., 448.

Blake *vs.* Burlington C. R. & N. R'y Co. (Ia.) N.W. Rep., 580.

R. R. Co. *vs.* Thomas, 79 Ky., 160.

R. R. Co. *vs.* Clemmons, 55 Tex., 88.

Abend *vs.* Terra Haute (etc.) R. R. Co., as cited above.

Also it is negligence to ride on tender of engine.
Doggett *vs.* R. R., 34 Iowa., 284.

In Hickey *vs.* Boston & Lowell R. R. Co. (14 Allen, 429), on page 432, the court says:

"But when the plaintiff's own evidence shows that he had left the place assigned for passengers and was occupying an exposed position, and that the injury was due in part to the fact of such position, he must necessarily fail, unless he can also make it appear, upon some ground of necessity or propriety, that his being in that position was consistent with the exercise of proper caution and care on his part. The front platform of a steam railway car * * * can not be otherwise, comparatively, than a position of exposure. The plaintiff proposed to show that the platform was not, as a matter of fact, a dangerous place in which to ride into the depot, under all the existing circumstances of the case; but, to do that, he must exclude from 'the existing circumstances of the case' the *fact of the accident.*"

This case is also an authority for the proposition that the practice or custom of riding in such a place does not show, or tend to show, that it is safe or prudent to do so.

The second question upon the refusal to give the instruction asked for is, whether or not it was negligent for the plaintiff to ride in the stock car under all the circumstances in this particular case.

In addition to the increased risk, owing to its place in the train, the stock car was a much more dangerous place than the caboose would have been had their positions in the train been reversed. According to the plaintiff's testimony, the only place where he could get out of the car was in the rear of the car, through a small, sliding window, the bottom of which was about four feet from the bottom of the car; the other doors and windows were all fastened

on the outside. To get out of this window would necessarily take considerable time, and would also necessitate climbing out between this car and the one following. It can be nothing but foolhardy, and, in a high degree, negligent, to put one's self in such a trap—being penned in so that even had his car been standing still, and the danger been apparent to him for five or ten minutes before the accident occurred, he would have been unable to have escaped in time. The defendant in this case owed the plaintiff no particular duty arising from the relation of carrier and passenger, and there was no testimony that the conductor or employés of the train on which the plaintiff was riding had consented to his being in this place of danger he chose to occupy, or knew he was there.

In deciding whether the being in the stock car constituted negligence or not, the fact of there being live stock in the car must also be taken into consideration. The plaintiff's testimony endeavors to show that the immediate cause of the injury was the pressing against him by one of the sheep in the car. It would seem that a car filled with live stock is a far greater place of known danger than a passenger car, or empty stock car, and that the plaintiff voluntarily and knowingly assumed the greatly increased risk.

Mr. Justice Walker, in P. & R. I. R. R. Co. *vs.* Lane, adm'x (83 Ill., on pages 451 and 452), sets forth the increased danger from loose articles in the car ,as follows:

"He (plaintiff's intestate), as all others, knew that the baggage car is not designed for passengers. It is alone for baggage, express matter, and such articles as passengers may be permitted to place therein as a matter of convenience and for the use of employés on the train. Where there are large quantities of baggage piled up in that car, in case of accident, persons therein would be liable to have it

fall on them and produce great injury, if not death, as was done in this case. This, therefore, renders it more hazardous than in the passenger cars. They are so constructed as to be free from such or like dangers. He must have known that the payment of his fare entitled him to a seat in a passenger car, and in consequence of that knowledge he appears to have taken a seat therein upon entering the train. Deceased left a place of safety and sought one of danger, and thus lost his life. His doing so was not invited or directed by the company. He, in going there, was guilty of a high degree of negligence, so high, in fact, that the company are exonerated from liability, unless the company were guilty of wanton or reckless misconduct on their part."

In Player *vs.* Burlington, etc. R'y (62 Iowa, 723), it was held that where a person having cattle on the train, who, with time to do so, fails to get aboard the caboose but boards a freight car and is injured while riding thereon, is guilty of contributory negligence, though defendant has negligently failed to bring the caboose within a reasonable distance from the depot.

We respectfully submit that the instruction asked for was unobjectionable as matter of law, and that the defendant was entitled to have it given under the evidence in the case.

V.

The court erred in refusing to give the special instruction asked by defendant, numbered 10:

"It appears by the evidence that the witness, Mann, had no duty to discharge at switches "A" and "B," and that his assuming to discharge the duties of the regular switch-tender at those points was unauthorized; and, if you further find, from the evidence, that the neglect on the part of Murphy, the agent and employé of the Pan-Handle Company, to attend to his duties in relation thereto was

the cause of, or in any way contributed to, the coming together of the two trains in question, then, in that event, the plaintiff must look to the said Pan-Handle Company for redress, and your verdict here must be for the defendant."

This request is based upon the facts in the case. Mann was not an employé of the Pan-Handle Company, but was employed by the Union Stock Yards and Transit Company. He had no duty at the switches in question. He testified that he gave a certain signal, having definite meaning, to the defendant's fireman, which, if obeyed, would have prevented the accident; on the other hand, defendant's fireman testified that Mann gave a signal *directly contrary*, in its understood meaning, to the one testified to by Mann, and that the accident was the result of Mann's error.

At the request of defendant's counsel the court gave defendant's instruction, numbered 9 (side page, 164):

"The defendant was lawfully upon the tracks in question, and while there was under the absolute control and direction of the servant or servants of the so-called Pan-Handle Company, and was bound to obey their instructions or signals, so that, if any injury was done to the plaintiff by reason of any mistake on the part of the servant of the said Pan-Handle Company, unless the defendants agents and servants wilfully and maliciously obeyed such signal or direction, knowing at the time that it had been given by mistake, your verdict must be for the defendant."

We believe that there can be no dispute as to the correctness of this portion of the charge. It correctly states the law as applied to the agents and servants of the Pan-Handle Company, and request number 10, which was refused, states, in effect, the same proposition of law, but applies it to the volunteer, Mann, who would not be re-

garded by the jury as an agent or servant of the Pan-Handle Company, unless so instructed by the court, and no instruction to that effect, or any allusion to it, was anywhere given in the charge.

VI.

The court erred in permitting Mr. Sloan, one of plaintiff's counsel, while addressing the jury, and against defendant's objection, to make the inflammatory and scandalous statements he did, without reproof, and without directing the jury to disregard the statements as being wholly outside of the testimony and record in the case.

Mr. Sloan said:

"When a railroad company goes into a litigation against a man they never stop that litigation until the last hour to which the case can be taken is reached."

(Due exception by defendant.)

Mr. Sloan, continuing, said:

"I think it is a matter of general experience and knowledge. Of course, I can argue that and infer it, gentlemen, from the fact that the income yearly of such a road as the Alton road, as everybody knows it to be, is millions of dollars, not hundreds and not thousands, as an individual, and when we get a verdict here poor Waterman has this long road to travel. The case has been taken from the State court and brought into this United States Court, and he has this long and expensive road to travel to Washington to the Supreme Court of the United States, where cases are hung up four years before determination."

(Due exception by defendant.)

Mr. Sloan, also, said:

"Then about seeing double. Could he tell whether a thing was double or single? I think it will not be im-

proper for me to explain how that occurred. If Mr. Fethers does not object, I will say that when these physicians were there we meant to have proved it.

'Dr. Senn asked: 'Does he see double?'

'Dr. Borden replied, 'No.'

'Waterman spoke up and said, "Yes, I can see double."

(Objected to by defendant.)

Mr. Sloan: "I said it was improper, and the only thing I did it for was to relieve Dr. Senn."

Mr. Fethers: "I wish an exception."

Court: "I think there ought not to be statements of that kind."

Mr. Sloan: "Certainly; but I think it is just to Dr. Senn to state it."

Mr. Sloan further said:

"This defendant is a railroad, but you have no right, and I am the last man to ask you to give a dollar to the plaintiff that you would not give if the defendant was an individual with as ample means. There is this satisfaction of knowing that, take a great and prosperous railroad company, like the Chicago & Alton, with its 850 miles of railroads, its income of millions of dollars, that $50,000 is no more than $500 to a man of a fortune of $100,000."

(Due exception by defendant.)

Mr. Sloan further said;

"Now, I think you should give such a sum that, when all the expenses of the litigation are deducted, it will leave to Waterman such a sum as will raise himself and family during the remainder of the years of his life above want."

(Due exception by defendant.)

Mr. Sloan further said:

"Will you give such a sum that, when the expenses of this litigation and of the coming litigation, when this

case travels to Washington, in the Supreme Court, it will—give poor Waterman nothing?"

(Due exception by defendant.)

(Record, pages 81–2.)

In Brown *vs.* Swineford, 44 Wis., 282, Chief-Justice Ryan says:

"If counsel, against objection, persevere in arguing to the jury upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, this, on exception duly taken, may be good ground for a new trial, or for a reversal; and the judgment herein is reversed on such grounds."

Citing Tucker *vs.* Henniker, 41 N. H., 317.
State *vs.* Smith, 75 N. Car., 306.
Ferguson *vs.* State, 49 Ind., 33.
Hennies *vs.* Vogel, Sup. Ct. Ill., 7 Cent. L. J., 18.

"It is error for the presiding justice to permit counsel, in addressing the jury, against seasonable interposition, to proceed with his argument upon asserted facts not in evidence and having no legitimate pertinency to the issue."

Rolfe *vs.* Rumford, 66 Me., 564.

"An improper argument by counsel, as an allusion to the wealth of the defendant and an appeal for heavy damages on that ground, should be checked by the court without waiting for the opposing counsel to object."

Willis *vs.* McNeill, 57 Tex., 465.

"A judgment may be reversed because of the refusal of the court to rebuke an attorney for a misstatement of the law."

State *vs.* Martin, 74 Mo., 547.

"An opening to the jury may be so unfair in its statement of irrelevant facts, and so well calculated to impress

the jury improperly, as to justify setting aside a verdict obtained by the party making it."

Porter *vs.* Throop, 47 Mich., 313.

"An improper remark of counsel in argument is not rendered harmless by his saying that he takes it back."

Wolffe *vs.* Minnis, 74 Ala., 386.

Baker *vs.* Madison, 62 Wis., 137.

"When counsel, in argument, make improper statements it is the duty of the court to have the proper correction made at the time."

Forsythe *vs.* Cothran, 61 Ga., 278.

"The court should not permit counsel in summing up to refer to matters not proved, and it is error to permit it after objection made. But if, on objection, such evidence is *immediately rebuked* by the court, *and not persevered in*, it is not cause for reversal *unless* it was made in bad faith and might have prejudiced the defeated party."

Gould *vs.* Moore, 40 N. Y., Superior Ct., 387.

"It is the duly of the trial judge to interpose to restrain counsel from indulging in argument and illustrations before the jury, unwarranted by the instructions."

Baltimore & Ohio R. R. Co. *vs.* Boyd, 10 Am. (Md.), 315.

VII.

The court erred in its rulings in admitting testimony of the plaintiff.

Upon the trial, as already appears, there was a radical difference between the plaintiff's witness, Mann, who turned switches "A" and "B," and the defendant's witness, Flynn, the fireman of defendant's engine, as to what signal was really given by Mann. The responsibility for the trains coming together as they did depends upon this testimony.

The fireman testified that Mann gave a signal to the defendant's train to back up; and Mann testified that he did not give a signal to back up, but gave a signal to stop.

On rebuttal, the plaintiff recalled Martin Murphy, the Pan-Handle switchman, and asked him this qustion:

Question. Did Mann give any signal to the C. & A. engine to back up, *that you saw?*

(Objected to; objection overruled; exception by defendant.)

Answer. No, sir: I did not see him give any signal. (Record, p. 77.)

We think it evident that this testimony must have been prejudicial to the defendant. The tendency of it was to confirm in the minds of the jury the testimony of Mann. Murphy does not claim that he had Mann under his observation during the time in question. The court nowhere instructs the jury to disregard Murphy's negative statement, or what weight to give it, if any at all. The jury may have determined that particular issue upon this testimony of Murphy thus improperly admitted.

VIII.

We submit that for the several errors in the charge, and the rulings of the court, the judgment should be reversed.

OGDEN H. FETHERS,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 118.

CHICAGO AND ALTON RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

HENRY H. WATERMAN.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM RUGER,
Attorney for Defendant in Error.
I. C. SLOAN,
Of Counsel.

JUDD & DETWEILER, PRINTERS.

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BRIEF FOR DEFENDANT IN ERROR.

(The references in figures are to *side* pages of the printed transcript, except when otherwise stated.)

STATEMENT OF THE CASE.

(NOTE.—As no brief for the plaintiff in error has been filed, we deem it proper to fully state the case and notice all exceptions shown in the record.)

This action was commenced in the circuit court for Rock county, Wisconsin, in August, 1884, to recover damages for personal injuries received by defendant in error on December 29th, 1882, by reason of alleged gross negligence on the part of the plaintiff in error.

For brevity the parties will hereinafter be designated by their titles below—plaintiff and defendant.

On petition of the defendant the action was removed to the circuit court of the United States for the western district of Wisconsin, where it was tried by jury in the latter part of December, 1885, and early part of January, 1886.

The contested issues of fact were—

1. Whether the defendant's servants were guilty of negligence as charged.

2. Whether by reason thereof the plaintiff was injured as claimed.

3. Whether his condition at the time of the trial was due to such injuries.

4. What compensation he was entitled to recover if the preceding questions were decided in his favor.

While the verdict is conclusive upon all issues of fact, we deem it proper to state the material facts in evidence to aid in the consideration of questions presented for review.

At the time in question, December, 1882, the plaintiff was about forty-three years of age and resided, with his family, consisting of his wife and three children, at Milton, in Rock county, Wisconsin.

For about nine years he had been engaged in buying stock about his home and selling the same in Milwaukee and Chicago. His business was fairly prosperous, and about one year prior to his injury he declined an offer of employment by the Northwestern Stock Company at a salary of $1,200, for the reason that he could do as well in his business and be more at home (48).

During his whole life, prior to his injury, his health had been unusually good. He had never had occasion to call a doctor for himself except on two occasions—once when he had measles and once for bilious colic.

He had never had any blood disorder or other ailments, except as above stated, and slight colds in the head, and some attacks of gastric colic caused by over-eating after hard work (41–'2, 48).

He had been robust, able to do hard work, and, in riding about the country in buying stock and in accompanying it on railway trains to market, he was inured to inclemencies of weather (41–'2).

On the evening of December 28th, 1882, he shipped by the St. Paul railway two cars of stock, at Milton aforesaid, for the stock yards in Chicago, which he accompanied to care for and sell. One car was loaded with cattle and the other with hogs and sheep, which were separated by a gate or partition extending across the car. Prior to the arrival of the train at Elgin, Illinois, his sheep had kept getting down and he had been compelled to get into the car frequently and raise them up to prevent their being trampled to death, and for this purpose after leaving Elgin he found it necessary to remain in the car with the sheep, as drovers in charge of sheep usually do.

This car was next to the caboose and the caboose next to the engine until the arrival of the train at a point in Chicago where the road engine and caboose were uncoupled and a switch or transfer engine coupled on to take the stock cars onward to the stock yards. This switch engine was coupled directly to this car in which the plaintiff was riding with his sheep (31).

In going from this point to the stock yards the St. Paul Company made use of the tracks of the P., C. & St. L. R. R. Co. and Union Stock Yards and Transit Co., as shown by the map between pages 10 and 11 of printed record (62–'3).

These four parallel tracks and their connections were in that locality used by all railway companies entering Chicago in delivering stock at the stock yards, situate about 1½ miles further to the south. It also appears that the defendant had used these tracks daily for years in delivering coal at points along the same south of Archer avenue.

The two tracks of the Union Stock Yards and Transit Company, marked Union Stock-Yards track, had been for six years in charge of the switch-tender, Thomas Mann, as an employee of the Union Stock Yards and Transit Company, and the two westerly tracks, marked P., C. & St. L. tracks (also called the Pan-Handle tracks), had been, for the same time, in charge of the switch-tender, Martin Murphy, as an employee of the Pittsburgh, Cincinnati and St. Louis Railroad Company.

It was the duty of these switch-tenders to attend the switches shown on the map and to give signals to trains to direct their movements in the use of these tracks.

With the knowledge and acquiescence of their employers they worked conjointly in performing these duties, and all railway companies using these tracks in that locality availed of the services of these switch-tenders in opening and closing switches for them, and were bound to obey their signals. When the plaintiff's (St. Paul) train arrived at Archer avenue it stopped upon the inner or easterly P., C. & St. L. track, awaiting a clear track and a signal to come forward. At this time the defendant's train, consisting of an engine and one car of coal, was standing on the same track, just south of switch B. The engine was headed, north toward the St. Paul train, with its coal car attached to its rear or southerly end. Its destination was Ackerman's coal yard, situate upon the side track, along which the map shows a fence, marked "board fence."

To allow it to get out of the way of the St. Paul train and proceed to its destination the switch-tender, Thomas Mann, turned switch B so as to connect the inner P., C. & St. L. or Pan-Handle track with the cross-over leading to switch A, and then went to switch A and connected the northerly end of the cross-over with the outer P., C. & St. L. track by pulling the switch target-lever over from its upright position, so as to stand leaning to the west. He then signalled defendant's engineer to come north, over this cross-over, upon

the outer P., C. & St. L. track, to the north of switch A. Defendant's engineer did move his train northerly over the cross-over and upon this outer track far enough to clear switch A with his engine, but not far enough to clear it with his coal car attached.

Meanwhile switch-tender Martin Murphy had come to switch B and signalled the St. Paul train to come forward along this inner P., C. & St. L. track over switch B and towards its destination—the stock yards—and, obeying this signal, the St. Paul engineer moved his train forward accordingly.

As the St. Paul train was thus moving toward and was about passing switch B, and while the switch-tender, Mann, stood with his hand on the target lever of switch A, waiting for defendant's train to move far enough north to clear that switch and allow him to throw the target lever back to an upright position, and thus disconnect the cross-over and reconnect the rails of the outer track, he heard some one on defendant's engine say, "All right," and thereupon defendant's train stopped moving north and commenced going back over the cross-over towards switch B and the St. Paul train, and Mann called out, "Hold on, or you will go into the Milwaukee," and also signalled with his hand for them to stop.

He testifies positively that he gave no signal for them to back up, and Martin Murphy, who then stood at switch B looking on, corroborates him; and it is manifest that he did not, for he had not been able to throw the switch-lever target back to an upright position so as to disconnect the cross over and connect the rails of the outer track, and thus permit defendant's train to go south, on this outer track, as desired (48 to 57).

Defendant's engineer was on the east side of his cab, and says he could not see the switch-tender, Mann, at switch A because the coal car intervened; that he asked his fireman, Martin Williams, "How is it back there? Can you see those

plates? Is the switch all right?" That his fireman put his head out of the cab window and said, "All right; back up," and he started back, supposing the switch was shut, until he had gone back far enough to see that he was running back over the cross-over into the St. Paul train (157).

The target-lever used by Thomas Mann in operating switch A stood about five feet west of the westerly rail, and was about seven feet high, and its position was intended to be, and was, an obvious and certain indication of the condition of the tracks at the switch (51, 57, 63).

If this fireman had been competent to perform his duties he would have known from the position of this target-lever leaning over to the west that the cross over track was still connected, and should have seen that the coal car was still resting on the switch, so as to prevent the switch-tender from moving it.

This Martin Williams had been put to work by the defendant as a fireman in this locality, requiring the best of skill on the part of trainmen, without any previous experience in railroading, only nine days before this occurrence, and was discharged in five hours afterwards.

He says a man standing near switch A, on the outside, gave him a signal to back up by a wave of the hand, but it is manifest from the circumstance, and positive testimony of Mann and Murphy, that the only signal he saw was Mann's signal for his train to go farther north, so as to clear the switch, or his signal to stop after they had commenced backing up. His own testimony discloses his incompetency and the worthlessness of his statement as to getting a signal to back up.

He says: "When at switch A, I was at the west side of the engine; the switch target was west of the track; it worked back and forth. When *perpendicular I think the rails of the cross-over track would be connected.*" The contrary is the fact, as already stated.

He also says: "I had not had experience to understand what the signal for brakes is." (155–'8.)

When the St. Paul engine had begun passing over switch B its engineer saw defendant's train begin backing over the cross-over track and gave two short sharp whistles for brakes.

The material facts subsequently occurring relate to the consequences to the plaintiff of this gross and criminal negligence on the part of the defendant.

The plaintiff was then sitting on the gate dividing the hogs from the sheep, facing toward the rear end of the car and having a brad-stick in his right hand. The sides of his car were slatted and he could see through the open space between the slats. When the engine of his train was about passing switch B he noticed the defendant's engine and coal car at switch A. He says: "Almost instantly with my seeing that engine she started just as fast as she could, backing toward us, right toward my car. I helloed and jumped toward the little end window in the rear end of the car. I sprang with my brad-stick with all my might and grabbed with my left hand the little round iron rod in the little window, and it seemed just as I grabbed that that that car struck mine. There was a chug and it came a little this way again, and then it seemed as though is turned this way again, and then it chugged that way, and then for a minute I did not know where I was. As soon as I recovered I found that I was thrown along. My feet were up, I think, at an angle of about forty-five degrees and I hanging with my left hand to the rod. My feet was up, and behind me was a lot of sheep crowding against me. * * * I lost control of myself probably, and they carried me along with my feet up toward the top of the car and I hanging with left hand to the window. I tried to regain my feet, to get over the sheep, back to my feet. My sheep were most of them wethers and had horns. One, which they called a stag sheep, seemed to be nearly in the center of my back and pressing against me there. The engine kept scaring them. He had large horns. After regaining my feet I tried to get out of the car. I raised my arms up and tried to raise the

window, and a sharp pain caught me in my side, a little back of the side, a little more toward the backbone, on the left side of my back. I let go my hold, and in probably a minute tried again, and the same little pain caught me. Then I took my brad-stick and pried against the rod on the side of the car and opened it about four to six inches; then I kind of pressed my side this way with my left hand and got my right hand where I could shove it, and shoved it back and climbed out of the car. I stepped around and thought I would poke my sheep back, and this pain caught me again in the back. The car was tipped over as far as the links would let it turn. They braced up three ties against the car I got out of to keep it from tipping over.

"The coal car stood almost lengthwise of my car and had shoved in under the frame-work of my car. The tender of the Chicago and Alton road seemed to be kind of mashed; it was stove up, and the water had run out.

"When inside of the car I expected it to go over every minute. I should think the floor of my car was tipped up at an angle of forty-five degrees. The sheep crowded toward the top and side of the car and were all piled up. The head of the buck sheep was against my back, like. The sheep were fat and strong and pressed against me pretty hard."

It further appeared that the doors of this car were fastened on the outside, and there was no way for the plaintiff to get out except through the window. After the defendant's engine and coal car were pulled away, the car plaintiff had been riding in settled down upon the track again, and the plaintiff got upon the St. Paul engine to ride from there to the stock yards. The caboose car had been taken off the train with the road engine before the train arrived at this place of the collision, as before stated.

Plaintiff testified that his side ached, and that the jar of the engine, as he was riding to the stock yards upon it, made him feel sick at the stomach. Arriving at the stock yards

he took breakfast and arranged with a commission man to sell his stock for him.

He says: "On account of my wrench I though I had better get home. I got a wrench in that car when they run into me in the morning; that was the time I got my side hurt." * * *

"The pain, when I was on my feet, would be in the left side of my back. If I would press my hand there I would not feel it so much." While waiting at Chicago he tried to reckon up what his cattle had cost him, but could not do so and could not sit down without falling asleep.

He arrived at his home in Milton about midnight, and his wife bathed his side with camphor, and heated flannels and placed them on him. He waked up two or three times before morning from the pain in the same place, and his wife repeated the bathing. He sent for his doctor, the witness, Wm. Borden, and he came before breakfast and examined plaintiff's side and back and put on hot applications. He grew worse daily for about seven weeks, and then, when sitting bolstered up in a chair, he felt a peculiar sensation coming over him. He says: "I called to my wife and said, I guess I am going, help me to bed; and she and pa helped me to bed. Wife put snow and ice on my head." "I did not hardly know nothing from that time for two or three months, and then I commenced to feel a little better. I have had pains, but never nothing like this in my back. When it takes me I have got to go down, that is all—to drop right down. I think I have not been free from pain since I was injured."

"All the time a dull, heavy pain, and at times very intense, sharp pains. They were very frequent, and it seemed as though I wanted somebody to take hold of me and pull and stretch me out." For three or four months preceding the trial these sharp pains were not as frequent, but the dull pain and tenderness remained continuously.

He had not been able to lie upon his back since his in-

jury, and required constant care from his wife and family, day and night. "I think for about two years and a half my wife was up with me every night from three to five times; sometimes all night." He had not been able to read since experiencing the peculiar sensation, when he thought he was going to die. For two years he could not have any one walk across the floor, or touch his bed, or read to him; could not bear any noise. Lately preceding the trial he felt terrible pains in the back of his head and in his forehead, and had a roaring sound in his ears at times. His speech had been affected ever since the night he thought he was going to die, when, as he said, "it went to my head." Reading makes him feel as though he was stunned. His back and limbs require rubbing three or four times a day, and he had to be assisted in attending to the calls of nature. His bowels had not moved since his injury without the aid of an injection or a dose of physic (31 to 48).

It was necessary to bring him into court on a cot, and he required assistance every time he changed position.

The medical witnesses were all agreed that he would either die soon or linger along in the same hopeless and most wretched condition, which cannot be appreciated from any mere description in words.

Such was the case on the merits as presented to the jury by clear, positive, and undisputed testimony.

As we do not know what errors will be assigned, we state the questions which are raised for review as follows:

1. Did the trial court err to the prejudice of the defendant in overruling objections to questions put to medical experts?

The question put to Dr. Wm. Borden will be found at side page 77, printed record.

He had been in constant attendance upon the plaintiff and had previously testified fully as to his condition and symptoms.

The same question, with an addition of assumed facts based on the testimony of Dr. Borden, was asked Drs. Philip Fox, William Fox, and S. Marks, who had examined the plaintiff, and testified as to his condition and symptoms (87).

The same question was asked Dr. Gapin, with a slight modification, made for the reason that he had not examined or testified as to the condition and symptoms of the plaintiff.

The printed record is erroneous in referring to side page 96 of the record for the questions asked Doctors William Fox, S. Marks, and Clark Gapin. The reference should have been to side page 87.

The question at side page 96 marked "Hypothetical question No. 2 for identification" was not put to any of the doctors except Philip Fox.

2. Did the court err to the defendant's prejudice in sustaining plaintiff's objections to the following questions asked Patrick H. Herrin by defendant's counsel?

"Q. Has any damage ever been charged back to your road by the St. Paul Co. by reason of what occurred there that morning, to your knowledge, with the information of the office in your charge?"

"Q. State whether or not where damage is done to the car of another company a report and a claim is made by such other company with the demand for the payment of damages" (143–'4).

3. Did the court err to defendant's prejudice in overruling its objection appearing at side page 156?

The exception to the decision of the court overruling the the defendant's motion for a new trial is not regarded as raising any question for review.

We mention in this connection that the motion for a new trial mentioned in the bill of exceptions (side page 178) was the only such motion passed upon by the court. After it had been overruled the defendant's counsel filed a

written and more formal motion, to which the clerk referred by recital in entering the judgment (side page 28).

The record also shows exceptions to remarks of Mr. Sloan, but these exceptions are not regarded as presenting any questions for review, as they do not relate to any ruling of the court.

The exceptions to portions of the charge and to the refusal of instructions of Nos. 8 and 10, asked by defendant's counsel, are not regarded as raising any questions for review, for the reason that all of these exceptions were taken by writing out and filing the same after the jury had returned their verdict and after the defendant's motion for a new trial had been overruled and the plaintiff's motion for judgment on the verdict granted (side pages 169 to 179).

We here note that the printed record at side page 168 is erroneous in saying that instructions Nos. 8 *to* 10 were refused. It should read 8 *and* 10, as number 9 was given.

BRIEF AND ARGUMENT.

I.

There was no error in overruling the objections to questions put by plaintiff's counsel to the medical experts.

The question put to Dr. Borden (side page 77) was objected to as not based on the evidence.

The same question, with the additional matter beginning at side page 87, was asked Drs. Philip Fox, William Fox, S. Marks, and also Clark Gapin, with slight modification, made for the reason that Dr. Gapin had not as yet examined the plaintiff or testified as to his condition and symptoms.

The objection to this question, as put to Drs. Philip Fox, S. Marks, and Clark Gapin, was stated as follows: "Objected to as incompetent and immaterial, and upon the further ground that the hypothetical question does not state

the evidence correctly which it purports to include in the question, and that it excludes all the constitutional and idiopathic conditions which should have been included in the question."

The question at side page 96 and those immediately following, put to Philip Fox, were not put to any other of the medical witnesses, although the printed record erroneously refers to it as the question put to William Fox, S. Marks, and Clark Gapin.

For the purposes of a hypothetical question it is proper to ask witnesses to assume as true any fact which any portion of the testimony tends to prove, and which counsel putting such a question deem material to the opinion called for; and it is not a good objection that such question does not embrace all the material facts, or that the evidence does not in fact establish the facts assumed.

These are questions for the jury, and the court will not decide them on such objections.

Quinn *vs.* Biggins, 63 Wis., 664, 670 foot, 671 top.
Harnett *et al. vs.* Garvey *et al.*, 66 N. Y., 641.
The L., N. A. & C. R'y Co. *vs.* Falvey, 104 Ind., 409, 418.
Filer *vs.* N. Y. C. R. R. Co., 49 N. Y., 42, 46.

If the defendant's counsel thought the questions put by plaintiff's counsel defective for failure to embrace facts which they deemed material to the opinion called for, or regarded the questions as misstating the testimony in any respect, it was their privilege to put questions based on their view.

L., N. A. & C. R'y Co. *vs.* Falvey, 104 Ind., 409–421.
Roger's Expert Testimony, 46.

The counsel for the defendant availed of this privilege fully in cross-examining these witnesses, and by his own questions called out from them the same opinions given in answer to plaintiff's hypothetical questions, with additional reasons, as would be noted by reading the cross-examination of these experts.

If the ground of objection was in part that the witnesses were asked to consider with the facts assumed, their own knowledge of plaintiff's condition and symptoms, the objection going to a single feature of a question should have specifically pointed out such ground, but if the objection had specifically stated this ground it would not have been good. All of the witnesses to which the question was propounded in this form had, just prior to the putting of this hypothetical question to them, testified to their knowledge of plaintiff's condition and symptoms which they were thus asked to consider, and had fully described to the jury such condition and symptoms.

Lawson's Expert and Opinion Ev., page 144, rule 30, and illustrations.

The L., N. A. & C. R'y Co. *vs.* Falvey, 104 Ind., 409, 418.

Hoard *vs.* Peck, 56 Barb., 202, 10.

Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.), 169, 170, foot, 172.

Matteson *vs.* N. Y. C. R. R. Co., 35 N. Y., 487, 492–'3.

The question put to Philip Fox, marked "Hypothetical question No. 2 for identification," at side page 96 of record, and the question following, put to same witness, side page 99, were in the nature of a cross-examination based upon the matters gone into by defendant's counsel in his cross-examination of this witness. In his cross-examination the defendant's counsel had tried to show that the plaintiff had not received a sufficient injury; that there was no external evidence that any considerable force had been applied against his back, where he claimed to have been injured, and that his symptoms did not indicate that his present condition was due to any physical injury.

But it is not necessary to regard these questions as in the nature of cross-examination to justify them. They are

clearly proper, considered as direct examination. Cases *supra*, and see also—

Lawson's Expert and Op. Ev., pp. 108–111. Illustrations.

Commonwealth *vs.* Mullins, 2 Allen (Mass.), 295.

Matterson *vs.* N. Y. C. R. R. Co., 35 N. Y., 492–'3.

Filer *vs.* N. Y. C. R. R. Co., 49 N. Y., 43, 44, 46.

A judgment will not be reversed because of the admission of incompetent evidence unless prejudice is shown, and prejudice will not be inferred if the verdict appears correct.

If any of the opinions given by the doctors were incompetent no prejudice to the defendant could have resulted. Strike out all of these opinions and the undisputed evidence remaining must force every reasonable mind to the conclusion that the plaintiff's condition at the time of the trial was due to injuries caused by this collision. He was robust and healthy up to the time of the collision. By reason of it he was jarred, shocked, and so strained in his left side and back as to cause sharp pains there immediately. These pains in his back recurred continuously thereafter, and partial paralysis ensued on the second day, and increased continuously until the hopeless condition existing at the time of the trial was reached.

Here was an adequate cause and natural result conclusively shown without aid from these opinions, and as no other adequate cause was shown, the jury must have come to the same conclusion in the absence of these opinions.

Matteson *vs.* N. Y. C. R. R. Co., 35 N. Y., 492.

II.

There was no error in, and the defendant was not prejudiced by, the rulings shown at side pages 143–'4.

The testimony called for was clearly immaterial and incompetent.

The tender of the defendant's engine was forced under the St. Paul Company's car in which plaintiff was riding, so that it would have tipped over, except for the holding of its couplings to the engine in front and the car next behind it. It was not much damaged, however, and the fact, if such was the case, that the St. Paul Company made no claim against the defendant has no significance whatever; and if this St. Paul car had been greatly damaged, and no claim had been made against the defendant on account thereof, such facts would have been immaterial to the issues in this action and incompetent. Their only bearing would be to show an implied *ex post facto* admission by the St. Paul Company that the defendant was not liable to it; and such an admission by the St. Paul Company would be, as against the plaintiff, both incompetent and immaterial.

If the collision had occurred through negligence on the part of both companies they would have been jointly and severally liable to the plaintiff.

Railroad Company *vs.* Barron, 5 Wall., 90.
Chapman *vs.* Railway Company, 19 N. Y., 341.
Bennett *vs.* Railway Company, 36 N. J. Law, 225.
Guddy *vs.* Hoen, 46 Mich., 596.
Transfer Company *vs.* Kellis, 36 Ohio St., 86.
Steller *vs.* Railway Company, 46 Wis., 497.
Atkinson *vs.* Goodrich Trans. Co., 60 Wis., 141–167.

Moreover, it did not appear that the witness had any knowledge on the subject, or that any books of the defendant containing information relative thereto were in his charge.

He was a mere yard-master, having no duty in the matter except to report the occurrence to some superior.

He had just testified to this, and that he had "examined the report of the affair recorded in our office;" and the question improperly assumed that books containing the information sought were in his charge, and, in effect, asked that he should state the contents.

If the fact sought to be shown had been material and competent evidence as against the plaintiff, it was not competent to prove it in this way.

III.

There was no error in overruling the defendant's objection shown at side page 156.

The defendant's counsel offered in evidence the deposition of Martin Williams, who acted as fireman on defendant's engine at the time of this collision. After reading, in the plaintiff's cross-examination, the question "Do you know whether the conductor was called upon for a report," the defendant's counsel read his objection to the answer, as stated on the face of the deposition, viz., that it was not responsive.

The court said: "It is not a good objection to it, that it is not strictly responsive to the question. He may answer it." The witness answered, "I was discharged. I don't know."

The ruling above quoted was the only ruling relative to this testimony.

If the defendant's counsel moved to strike out the witness' answer as incompetent, it does not appear that the court noticed or ruled upon such motion.

As the answer was given upon the cross-examination by plaintiff's counsel, it did not lie with the defendant to object that it was not responsive.

A portion was strictly responsive, and the residue explanatory. The objection went to the whole. The counsel feared that the immediate discharge of this fireman would be regarded as an admission of his incompetency and negligence; but this, and also the fact of his immediate discharge had been already proven by unchallenged testimony.

The conclusive testimony as to his incompetency and negligence has been already noticed.

As to the discharge, the defendant had proved by Robert Miller that he made a report of the collision; that the defendant's rules required that every train hand connected with it should make a report within twenty-four hours (152). The defendant's engineer, Lynch, had testified: "This was the fourth or fifth day the fireman, Martin Williams, had worked with me; don't know as he has ever worked on the road since" (150).

This fireman, in his deposition taken and offered by the defendant, had testified: "I had been working for the company for nine days prior to that day. * * * I had never worked at railroading *only those nine days and five hours.* I was not called upon to make a report by any officer of the Chicago and Alton" (156).

It thus appears that the subsequent reading of the witness' answer, "I was discharged; I don't know," could not have prejudiced the defendant.

Again, it would have been competent to prove this immediate discharge of this fireman by the defendant as an admission on its part that the collision was caused by his incompetency and negligence.

IV.

The exceptions to Mr. Sloan's remarks do not raise any question for review.

The court was not asked to rule as to the propriety of any of them and did not do so, except by the remark, "I think there ought not to be statements of that kind" (shown at side page 167). This was favorable to the defendant, and equivalent to directing the jury to disregard statements of that kind.

The license to be allowed counsel in addressing juries rests in the discretion of the presiding judge, who best knows of things done and said by the witnesses and opposing party and counsel, and can better judge whether remarks criticised were prejudicial.

It is well settled that the question of abuse of this discretion cannot be presented for review without a ruling by the trial court adverse to the party complaining and an exception to such ruling.

Bullis *vs.* Drake, 29 N. W. Rep., 292.
Mulcairns *vs.* City of J., 29 N. W. Rep., 565, 568.
Maclean *vs.* Scripps, 52 Mich., 215, 222–'3.
Parker *vs.* State, 33 N. W. Rep., 52, 56.

V.

The exceptions to the charge and refusal of the defendant's proposed instructions 8 and 10.

Many decisions of this court support the position that these exceptions do not present any question for r stated, they were taken by the mere filing of a wr ment of them after verdict was rendered and af fendant's motion to set aside the verdict and for a had been overruled and the entry of judgment o dict directed.

Phelps *vs.* Mayer, 15 How. U. S., 160, 161.
Turner *vs.* Yates, 16 How. U. S., 14, 29.
Railway Co. *vs.* Heck, 102 U. S., 120.

If reviewable none of these exceptions would be found well taken. The charge covered the whole case and was favorable to the defendant in all respects, and so favorable in some as to justify criticism on the part of the plaintiff.

In using the Pan Handle and Stock Yards tracks the defendant availed of the services of the switch-tenders in charge of them, and yet the charge would have relieved the defendant from liability if the negligent running of its train had been caused by fault on their part, and except for the pointed caution of the charge the damages would undoubtedly have been more nearly adequate.

The giving of defendant's proposed instruction 8 would

have been equivalent to directing a verdict for the defendant, when, in fact, the case warranted the direction of a verdict for the plaintiff, if such a direction is ever proper on an issue of negligence. As before stated, there was no caboose car on the train when it arrived at the place of this collision. It had been taken off, with the road engine, at the place where the switch-engine was coupled onto plaintiff's car to take it and the other stock cars onward to the stock yards. Again, it is usual for drovers in charge of sheep to ride in the car with them. In so doing they assume the risk of dangers to be anticipated, and which exist because of their presence in such a car, but not of dangers which come through the negligence of others, and between which and the fact of their riding in such a car there is no causal connection.

R'y Co. *vs.* McCloskey's Adm'r, 23 Penn. St., 526, 532.

m v R'y Co 64 Wis 454, 456-7.

If a charge of contributory negligence could be predicated on the fact of plaintiff's being in this car, it is too clear for argument that the court could not impute negligence as matter of law.

R'y Co. *vs.* Stout, 17 Wall., 657, 663–'4.

The defendant's proposed instruction 10 assumed, in contradiction of evidence, that the switch-tender Mann had no authority to attend switches A and B, and misstated the law.

If, as against the plaintiff, Murphy is not regarded as the defendant's servant, his negligence, contributing with that of the defendant's servants, as supposed by the instruction, would not relieve the defendant from liability; that joint wrong-doers are jointly and severally liable is very familiar law.

And, as against the plaintiff, these switch-tenders were, in

legal contemplation, the defendant's servants in so far as it availed of their services in running its train.

Taylor *vs.* R'y Co., 45 Cal., 323, 334.

Oil Creek & A. R'y Co. *vs.* Keighron, 74 Penn. St., 316.

R'y Co. *vs.* Peyton, 106 Ill., 534.

VI.

The overruling of the defendant's motion for a new trial does not raise any question for review.

Railway Co. *vs.* Heck, 102 U. S., 120.

VII.

If the question of damages is open for consideration, we submit that the amount awarded is inadequate instead of excessive. It does not fairly compensate for pecuniary loss, to say nothing of life-long mental and bodily agony. The plaintiff was 43 years old when injured. His income was at least $1,200 per annum.

Since his injury he has required constant medical attendance, and most painfully realizes that instead of being able to support and care for his family, his wife and comparatively young children have taxed their utmost energies to care for and support him and themselves through seven long years of waiting for such pecuniary reparation as the law requires from the defendant.

The extreme hardship of this case and its vital importance to this long-suffering plaintiff has led us to extend this argument unwarrantably, we fear.

In conclusion, we submit that the writ of error in this case was manifestly sued out for delay, and that the inadequate damages awarded should be increased under the 23d rule of this Court.

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I. C. SLOAN,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 118.

CHICAGO AND ALTON RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

HENRY H. WATERMAN.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF IN REPLY FOR DEFENDANT IN ERROR.

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To avoid risk of being in default we were obliged to prepare and file our brief for the plaintiff (defendant in error here) without opportunity to examine the brief for the defendant. We could only conjecture as to the assignments for error, and positions to be relied on as supporting them.

The defendant's counsel claims, in substance, that the collision was so gentle that there could not have been much jar or shock; that the plaintiff could not have received sufficient injury to account for his subsequent condition, and that it resulted from disease and not from injury.

In support of these claims the counsel makes broad statements as to the testimony of the defendant's medical experts, Drs. Senn, Whiting, Buckmaster, and Ward, and quotes some carefully culled extracts from the testimony. To show the value of these extracts and claims we quote as follows:

In describing the collision the plaintiff says:

"I sat on this gate with my left arm holding on to the sides of the car, the boards, and I had a brad-stick in my right hand—one I used to punch cattle. I was facing the back end of the train. In a few minutes after I noticed the toots, I noticed a switch-engine and a car of coal near switch A. Almost instantly with my seeing that engine she started just as fast as she could, backing towards us—right towards my car. I hallooed and jumped towards the little end window in the rear end of the car. I sprang with my brad-stick. I had a brad in my right hand and I sprang with all my might and grabbed with my left hand the little round iron rod in the little window, and it seemed just as I grabbed that that car struck mine. There was a chug and it came a little this way again, and then it seemed as though it chugged this way again, and then it chugged that way, and then for a minute I did not know where I was. As soon as I recovered I found that I was thrown along; my feet was up, I think, at an angle of about 45 degrees, and I hanging with my left hand to the rod. My feet was up, and behind me was a lot of sheep crowding against me. They had been all of them cuddled up together, and the sheep had carried me right along, I suppose. I lost control of myself, probably, and they carried me along with my feet up towards the top of the car and hanging with left hand to window. I tried to regain my feet. My sheep were most of them wethers and had horns. One that they call a stag sheep seemed to be nearly in the center of my back and pressing against me there. The engine kept scaring them. You know how they will take to crowding. He had large horns. After regaining my feet I tried to get out of the car. I raised my arms up and tried to raise the window, and a sharp pain caught me in my side, a little back of the side, a little more towards the backbone, in the left side of my back. I let go my hold and in probably a

minute tried again, and the same little pain caught me. Then I took my brad-stick and pried against the rod in the side of the car, and opened it about four to six inches. Then I kind of pressed my side—this way—with my left hand and got my right hand where I could shove it, and shoved it back and climbed out of the car. I stepped around; thought I would poke my sheep back, and this pain caught me again in my back. The car was tipped over as far as the links would let it turn. They braced up three ties against the car I got out of to keep it from tipping over. When inside of the car I expected it to go over every minute. I should think the floor of my car was tipped up to an angle of forty-five degrees." (32–34.)

MARTIN MURPHY says:

"Heard the noise of the collision. Of course there was a shock. There must be a jar as long as the car is lifted up three feet. The wheels were lifted from the track about three feet." (53.)

THOMAS MANN says:

"The wheels of the car ran into were raised from the rails two feet and the body of the car tipped over about three feet, being coupled onto the engine and other cars, held it."

JOHN J. FLINN, engineer on St. Paul engine, says:

"The first that attracted my attention—our engineer, he saw them just about as they struck him, just as they were almost onto him. He hallooed and he pulled the whistle for brakes, and by that time they had struck the cab of our engine, and I jumped out of the fireman's window. The car of the C. and A. scraped our tank, twisted our cab, and broke two of the windows. The tank of the C. and A. engine kind of wedged under our first car and canted it over. The wheels were in the neighborhood of two and a half feet from the track. We propped it up with a stick." (59.) "There was a jar and grating crash when they came together." (60.)

M. S. ROGERS, engineer of St. Paul train, says:

"The top of the Alton car struck the corner of my cab.

My engine or tank threw that car off the spur track onto the ground. I should think that the next car back of my engine was raised up one-third of the way to tip it over. There was one or two posts put under it to keep it there, I think. The tank of the Alton engine had a hole cut in it." (63.)

Defendant's witness, PATRICK H. HERRIN, says:

"The Alton car was clear of the St. Paul stop car when I saw it, and it was off the track, and probably thrown off the track by striking the St. Paul engine, and then when the engine that was attached to the coal car came along, not being off the rail, it followed that connection down until it came in contact with the stock car of the St. Paul and ran under the edge of it. The wheels were off the rail. The tank of the Alton engine had run under the St. Paul car and thrown it up—the truck about six inches and bottom of car the length of check chains. Ties had been placed under the Milwaukee car on the east side to keep it from tipping over." (144–'5.)

Defendant's witness, CHARLES J. LYNCH, says:

"I reversed the engine and threw her on the forward motion, giving her steam, but the force applied pulled up right up there, and, the Milwaukee train going by there at the same time, the south end of my car struck the Milwaukee train, and it kind of blocked in there together and pulled me along a little bit until it finally threw my car off the track. When my car struck the tank of the Milwaukee engine it kind of knocked the car off. This part staid on the rail for the time being. The forward part of the car goes off the track and runs along like that till the car comes in together in that shape. This end of the car binds up against the end of the St. Paul stock car and raises it up. St. Paul train pulled me along and run my tank under St. Paul stock car. There is a big beam along in these cars, and that beam caught my tank on the side of the tank and held it right there, and the pressure (this car being off the track and the Milwaukee train pulling me in that way) punched a hole in the side of the tank. The St. Paul stock car, at the end nearest the St. Paul engine—the truck wheels were raised some 6 or 8 inches from the track, and the St. Paul stock car was

raised as far as the bearings would let it raise, somewhere near 2 feet from its level position." (147–'8.)

Defendant's witness, MARTIN WILLIAMS, says:

"We backed over the connection into the Milwaukee train, and tipped one car over with stock and tore the side out of our tender." (156.)

The defendant's counsel says:

"The medical testimony on the part of the defendant, given by Drs. Senn, Whiting, Buckmaster, and Ward, was emphatic that the plaintiff's condition was the result of disease and not of injury."

We quote briefly on this point. After making the statement on which the statement of defendant's counsel is based and giving an opinion that the plaintiff had locomotor ataxy, Dr. Senn says:

"Assuming that locomotor ataxy might be of traumatic origin, I don't presume that such cases would be differentiated from others, because they produce the same pathological conditions." (123.)

"I stated distinctly I knew no cause. I don't know the cause. I didn't pretend to know what the cause was in this case." (124.)

"Q. As to locomotor ataxy, I find it laid down in Ross' work that emotional disturbances, such as sudden fright, is among the causes. Would you agree with that?

"A. I should say yes.

"Q. He also says that various traumatic injuries may be the starting point of locomotor ataxy, and instances are recorded in which the disease soon followed a fracture of the thigh, a fall upon the belly, the shock of a gunshot wound, and concussion of the spinal cord.

"A. Exactly. I agree with that, certainly." (124–'5.)

"Q. In treating of concussion of the spine and describing the fourth class of cases mentioned, Mr. Ross uses this language: 'Very slight symptoms at the beginning. After a long or a short time the result is doubtful. These cases are usually caused by railway collisions. The symptoms are generally insignificant immediately after the injury; sensa-

tion of having been severely shaken; suffers from momentary weakness and slight confusion of mind, but soon recovers, picks himself up, and walks about. On the next day or several days, weeks, and even months later more threatening symptoms set in. Pain appears in the back and limbs and gradually increases in intensity. The patient feels feverish; suffers from mental depression—sleeplessness—with strong tendency to emotional weakness, and cannot attend to business; complains of noises in his ears, * * * and on attempting to read the letters become confused. * * * The back is painful when moved, and some of spinal processes are tender on pressure; girdle sensation; suffers from feeling of constriction of the head, sleeplessness, weakness of memory, impaired power of work. In fact, his whole character has undergone entire change.'

"A. I recognize that, and think it is a very good description. One of the first things to be done is to get the history of the case—to inquire as to any injury the patient may have received." (126–'7.)

Defendant's witness, Dr. WHITING says:

"Assuming that the testimony of the plaintiff, as I have heard it read, is true and from personal examination of him to-day, I am of the opinion that he has degenerative disease of the spinal cord proper, the disease that is ordinarily known as locomotor ataxy." (130.)

"The plaintiff has paralysis, as we ordinarily understand it." (131.)

"In my opinion, a degenerative disease of the spinal cord caused the present condition of the plaintiff. I don't know what caused the degenerative disease. Locomotor ataxy is not commonly produced by traumatism. Mr. Ross' work is a standard work, and what he says—'various traumatic injuries may be the starting point of locomotor ataxy'—is all right. Any external force that produces injury is traumatic. My idea of a traumatism is where there is evidence that there has been violence done. If there was any evidence in this case that traumatism had been applied to the spinal column, and such traumatism as could produce the injury complained of on this occasion, then I should say that the traumatism, perhaps, was the exciting cause of this condi-

tion of the spine, but when there is no evidence produced here that there was any traumatism of the spinal column, then, I say, I do not take that in as an element." (133.)

"I recognize concussion as one character of traumatic injury. I can't get it out of my mind that the two trains moving very slowly, about at the same rate of speed—I can't get it into my head that he could be thrown with great velocity in the shock of two trains coming together with so little force that the impinging of each other stopped the trains." (134.)

"Under the evidence, as given in the progress of the trial, I think there is no element of traumatism in this case. You might get a slight injury that would amount to traumatism and eventually result in permanent disability." (135.)

Dr. BUCKMASTER says:

"From the amount of injury, the amount of concussion he must have received, if any, from the collision, as described to me, I don't think there is any traumatism. I didn't find any evidence of it. I don't think there was sufficient force to cause traumatism. * * * I think he has locomotor ataxia or at least a prominence of the symptoms of locomotor ataxia. * * * It would be mere guess-work for me to state the cause of locomotor ataxia properly attributed or caused by traumatism. * * * What I have meant to say was this: I could not see that the result could follow the injury of the collision, the shock of which was so light as that must have been, as it was described to me. I don't think the shock sufficient to produce traumatism. I should not pretend to say that he might not have received such an injury. As I understand, the cars were moving on a parallel track at a slow rate of speed and the car merely lifted up. I don't know that there was a chug chug. * * * It is a *question any one can determine for themselves just as well as a medical man. It does not apply to medicine.*" (138–140.)

It will be seen that these medical experts based their opinions on a mere unwarranted inference of lack of force to cause physical injury. We add extracts from the testimony of the plaintiff's medical experts.

Dr. BORDEN says:

"Have known plaintiff 31 years; have been his family physician 15 to 17 years; saw him during that time and before frequently; doctored in his father's and grandfather's family. * * * Prior to December 29, 1882, I had never attended him for anything but colic, gastralgia, and indigestion on two or three occasions, the last time 4 or 5 years prior to 1882. I saw him the morning of December 30, 1882, between 7 and 8 o'clock. I found him with soreness and pain on motion on the left side, between the angle of the ribs and the back. * * * Round the short ribs, right in between that and the backbone, * * * there was tenderness when I pressed on the long rib or under that, the long rib. At that time his system seemed to be in a depressed condition. The next day I saw him again. * * * He thought that his side felt a little better. He seemed to be in about the same condition, and remained so until about the middle of the next week; about that time he began to complain of a pain in his back, and he could sit up with difficulty, and he didn't like to." (71–'2.)

After detailing the progression of the symptoms and his condition down to the trial he was asked his opinion, and says:

"I should think it was inflammation resulting from the injury received in the car at the time of the collision; in other words, I should think the injury was the exciting cause of the condition." (81.)

Dr. PHILLIP FOX says:

"I determined that he was suffering from inflammation of the membranes of the spinal marrow and to some extent the spinal cord itself. I think that the man will die." (87.)

"I should naturally infer that he received an injury which led to the condition which now exists. According to that question I look at that as the origin and cause of the condition, the injury received at that collision." (90.)

Dr. WM. FOX says:

"It seems to me that the experience of that night was the

cause of the condition—the injury received then in the collision." (101.)

Dr. MARKS says:

"I should conclude that the injury caused inflammation of the spine. Taking the whole history of the case with no other light, it was the result of injury causing inflammatory action—injury received in that collision." (102.)

Dr. GAPIN says:

"Taking into consideration the facts as stated in your hypothetical question, and basing my opinion upon it, I should most unhesitatingly say that the injury at that time received was the primary cause and led to the subsequent development of disease from which he is now suffering. * * * I think his progress will be constantly downward" (103). "I think the progress of this case indicates that it is of traumatic origin" (104). "The rapid progress of the disease in its first stage in this case cannot be accounted for on a constitutional basis." "I should say there was some laceration of tissues that set up an inflammatory action, that progressed slowly, which ultimately involved not only the membranes, but the spinal cord itself, and gave rise to the condition which we know as spinal sclerosis. I don't exclude locomotor ataxy. I mean locomotor ataxy and more." (103.)

Being recalled later, Dr. GAPIN says:

"I have made an examination of the plaintiff since I was on the stand. * * * My judgment as to the origin of the disease is not changed, and I have become more confirmed in my opinion that the origin of the disease was an injury and the character of the disease is inflammatory." (161.)

The defendant's counsel relies upon his assignments for error based upon his exceptions to portions of the charge and to the rulings refusing to give defendant proposed special instructions 8 and 10.

As stated, all of these exceptions were taken after verdict

rendered and after the defendant's motion for a new trial had been overruled and the court had, on plaintiff's motion, ordered the entry of judgment on the verdict. (169, 175, 178–'9.)

On page 19 of his brief the counsel concedes this, and refers to common law rule 58 of the circuit court of the United States for the western district of Wisconsin and section 2869, Revised Statutes of Wisconsin, as supporting his claim that these exceptions present questions for review.

The defendant is not aided by either this rule or statute (see this rule, which may be found in the library). That exceptions so taken do not present any question for review is, by the decisions of this Court, established as a rule of law.

Phelps *vs.* Mayer, 15 How., 160, 161.
Turner *vs.* Yates, 16 How., 14, 29.
Barton *vs.* Forsyth, 20 How., 532, 533–'4.
Railway Co. *vs.* Heck, 102 U. S., 120.

And this rule of law is unaffected by section 914, Revised Statutes United States, or the statute of Wisconsin or rule referred to.

The Chateaugay, &c., Co., petitioner, 128 U. S., 544, 553–'5.
Audes *vs.* Slauson, 130 U. S., 435, 438.

It seems clear that the exceptions on which the defendant's assignments for error from first to fifth are based do not present any questions for review. We therefore doubt the propriety of saying anything as to the merits of the questions discussed by the counsel as presented by them, and shall reply but briefly.

The counsel claims that the court erred in the portion of the charge recited in the first assignment for error and in refusing special instruction 8, recited in the fourth assignment.

The pertinent evidence is briefly as follows: The plaintiff testifies:

"I rode on a contract for two cars of stock. * * * The stock contract I got from the agent called for a right of passage of one man *in charge of two cars.* * * * On the night of December 28, 1882, we reached Elgin about 1 o'clock, and I rode in the car with the sheep from there to Chicago. * * * When not stirring up the sheep I would sit on the gate. * * * If the sheep got down where they were packed in together he would soon be trampled to death or smothered. They would not try to get up unless you lifted them." (42.) "At Rockton I lifted up sixteen sheep that had got down. They kept getting down. I found I had got to remain in my car or else lose my sheep. * * * We stopped for lunch near Elgin, Ill. After luncheon I got in the car with the sheep and found some down, and so I stayed there with the sheep the balance of the way to Chicago. We unhitched from the train when we got to Chicago. I climbed out and walked around. * * * I jumped into the car and a switch-engine backed down and hitched onto *the front end of my mixed car, which when I was going in was next to the caboose; now it became next to the engine.*" (31.)

After describing the collision he says:

"My side ached a little and I did not want to climb up in my car. I got on the engine after that, that was pulling our train, stepped from the engine onto the tender, * * * and rode along down to the stock yards." (35.)

It is inferable from this testimony that the caboose car was not on the train at the time of the collision, and there is nothing in the record to rebut this inference.

On this state of facts the counsel claims that the court erred in refusing to instruct the jury that the plaintiff was negligent in riding in the car with his sheep at the time and place in question as stated in his proposed special instruction 8, which also assumed that the caboose car was then on the train.

The counsel relies on cases selected from the class between

carrier and passenger where passengers unnecessarily and without license were on portions of the train not provided for their use, and being there injured under circumstances showing that they would not have been injured if they had been in the part of the train provided for their use.

Such cases are inapplicable for several reasons.

Here the case is not between carrier and passenger, and the plaintiff's being on this car had no causal connection with his injury.

There was just as much likelihood that the defendant would recklessly drive into a caboose car as any other, and if this were otherwise negligence cannot be imputed for failure to guard against a danger not reasonably to be anticipated, and which can only come through the gross negligence of others. If some one from the wayside had negligently fired a gunshot and hit the plaintiff in this car it would have been just as reasonable to say to the plaintiff, Your proper place was in the caboose; you would not have been hit if you had been in the caboose, and were guilty of contributory negligence in being where you were.

If this suit had been between carrier and passenger negligence could not be imputed any more than it could be imputed to an engineer for being on the engine or the baggageman for being on the baggage car. The plaintiff's duty required him to ride in this car.

R'y Co. *v.* McCloskey, 23 Penn. St., 526, 532.
Lawson's Adm. *v.* R'y Co., 64 Wis., 447, 454, 456–7.
And see also R'y Co. *v.* Horst, 93 U. S., 291, 298.
Lackawanna, &c., R. R. Co. *v.* Chenewith, 52 Penn. St., 382, 386, 388–9.
The Wabash, &c., R'y Co. *v.* Shaklet's Adm'r, 105 Ill., 364.

The criticism of the charge as withdrawing the question whether the plaintiff was guilty of contributory negligence

in being in this car at the time of the collision is wholly unjustifiable and quite surprising. The court expressly submitted the question of contributory negligence as follows:

"And if you should find such to be the fact from the evidence, and that the defendant was guilty of negligence in so running its train against the car in which the plaintiff was riding at the time and place in question, and that by reason thereof the plaintiff was injured without fault or negligence on his part contributing to the injury," etc. * * * "And so also the plaintiff cannot recover if you find that he was himself guilty of negligence which produced or contributed to produce the injury." (172–'3.)

The criticisms upon the portions of the charge recited in the second and third assignments seem hypercritical; especially so when the context is noted.

The positions of law stated in support of the fifth assignment are so manifestly untenable as to make further discussion unjustifiable. As already shown by authority, the court charged too favorably to the defendant as to the effect of negligence, if any, on the part of the switch-tenders. We note, however, one claim made in this connection as to matter of fact. The counsel at page 39 of his brief says:

" He (Mann) testified that he gave a certain signal, having definite meaning, to the defendant's fireman, which, if obeyed, would have prevented the accident. On the other hand, the defendant's fireman *testified that Mann gave a signal directly contrary* in its understood meaning to the one testified to by Mann, and that the accident was the result of Mann's error."

How far this is sustained by the testimony will appear by consulting the record at side pages 152–'3, 156, 157–'8, 159.

In respect to the sixth assignment we desire to add but one suggestion.

The question of the propriety of rulings made as to the

arguments of counsel is a mere practice question, not subject to review here.

Lancaster *vs.* Collins, 115 U. S., 222, 225, foot.

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